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No._____

In The
Supreme Court of the United States

OCTOBER TERM, 1987

OKLAHOMA TAX COMMISSION,
Petitioner,

v.

THE MUSCOGEE (CREEK) NATION *et al.*,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

STANLEY P. JOHNSTON
Assistant General Counsel
Oklahoma Tax Commission
2501 Lincoln Boulevard
Oklahoma City, Oklahoma 73194
(405) 521-3141
Attorney for Petitioner

QUESTIONS PRESENTED

1. Whether the State of Oklahoma may validly require the Muscogee (Creek) Nation and its corporate, non-Indian management company to collect and remit state sales taxes imposed upon the customers of the Tribe's bingo and other retail activities conducted upon a tribally-owned tract of land within the City of Tulsa, Oklahoma.

2. Whether the tribally-owned tract of land upon which the Muscogee (Creek) Nation conducts its commercial operations is an "Indian reservation" either within the meaning of 18 U.S.C. §1151(a) or for purposes of determining the State's ability to tax the activities conducted thereon.

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OKLAHOMA TAX COMMISSION,

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THE MUSCOGEE (CREEK) NATION, *et al.*,[1]

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner, Oklahoma Tax Commission, respectfully prays that a writ of certiorari issue to review the order and judgment of the United States Court of Appeals for the Tenth Circuit entered in this proceeding on September 22, 1987.

OPINIONS BELOW

The Order and Judgment of the Court of Appeals, which is not yet reported, appears in the Appendix at A-1 to A-33. The orders of the United States District Court for the Northern District of Oklahoma, which is unreported, appear in the Appendix at A-34 to A-57.

[1] The Petitioner, Oklahoma Tax Commission, an agency of the State of Oklahoma, authorized and mandated by State law to administer and enforce the tax laws of said State, was defendent-appellant long with David Moss, District Attorney for Tulsa County, Oklahoma in this action brought by the Muscogee (Creek) Nation and Indian Country, U.S.A., Inc., a South Dakota corporation, against the State of Oklahoma *ex rel.* the named defendents. The members of the Oklahoma Tax Commission at the time of filing the action below, named in their official capacities, were: Odie A. Nance, Chairman; Robert L. Wadley, Vice Chairman; and Don Kilpatrick, Secretary-Member.

JURISDICTION

The order and judgment of the Court of Appeals was entered on September 22, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Title 18 United States Code §1151(a) is set forth in Appendix A-60. The relevant State taxing statutes, 68 Oklahoma Statutes §§232, 1354 1(A), (E), (I), (L) and (M), 1361 (A) and (B), and 1367, are set forth at Appendix A-61 to A-64.

STATEMENT OF THE CASE

A. Nature of the Controversy

The Muscogee (Creek) Nation ("Tribe") by contractual arrangement with its corporate, non-Indian management company, Indian Country, U.S.A., Inc. ("ICUSA"), conducts high stakes bingo games, sells bingo supplies and accessories and operates a restaurant at a bingo hall located within the city limits of Tulsa, Oklahoma under the business name of Creek Nation Bingo.

The Creek Nation Bingo hall is located on a tract of land the courts below have referred to as the "Mackey site," title to which was quieted in the Tribe in 1925 by decree of the Untied States District Court confirming a settlement agreement of the parties in the case of *Unted States v. Mackey*, No. 1733 Equity (E.D. Okla., July 13, 1925), (Appendix A-58, 59); one of a series of lawsuits brought by the United' States on behalf of the Tribe to claim the proceeds of mineral production under the bed and flood plain of the Arkansas River.

Oklahoma's Sales Tax Code[2] requires vendors of tangible personal property and various entertainment activities, including bingo, to collect sales taxes from their customers and remit the same to the Oklahoma Tax Commission. Timely remittance of the sales tax each month entitles the vendor to retain as remuneration for

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[2] 68 Okl. Stat. §1350, *et seq.*

record keeping, etc., a percentage of the sales taxes collected;[3] while failure to collect and remit sales tax is grounds for injunctive relief by the State.[4]

Neither the Tribe nor its management company operating Creek Nation Bingo, has collected or remitted sales taxes on the bingo operations or the associated restaurant and other retail sales; nor do they concede their obligation to do so. This, despite the fact that the Tribe does concede that the whole operation caters to and depends upon patronage by the general public, not members of the Tribe, and ninety-five per cent (95%) of whom are residents of the State of Oklahoma.

B. The Proceedings Below

The Tribe and its corporate management company brought an action in the federal district court for declaratory and injunctive relief against the Oklahoma Tax Commission from enforcing the State's tax laws, and against the District Attorney of Tulsa County from enforcing the State's gambling and bingo laws against the activities conducted by Creek Nation Bingo upon the land owned by the Tribe.

The United States District Court for the Northern District of Oklahoma found that the land in question, the Mackey site, is an Indian Reservation as defined by 18 U.S.C. §1151(a). The District Court then held that Oklahoma law was pre-empted both as to regulation and as to taxation of what it found to be a tribal activity; and a permanent injunction was issued.

On appeal, the Tenth Circuit affirmed the decision of the lower court, holding that the site was an "Indian reservation" under 18 U.S.C. §1151(a) and, relying in large part on *California v. CabazoneBand of Mission Indians*, __U.S.__, 107 S.Ct. 1083, 94 L.Ed.2d 244 (1987), held that state law was pre-empted as to the "on-reservation" activity.

The Oklahoma Tax Commission urges this Court to review that decision and to find that the public, commercial activities carried on

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[3] Three percent (3%) of the taxes collected as of the time this action was filed. The rate has since been changed to 2 1/2%. See Appendix A-00.

[4] 68 Okl. Stat. 232. See Appendix A-61.

by the Tribe are subject to the non-discriminatory excise tax laws of the State.

REASONS FOR GRANTING THE WRIT

The opinion below affirms a decision which judicially resurrects the remains of a former Creek reservation to create a tax-free zone of commercial activity, contrary to applicable decisions of this Court, which not only was neither foreseen nor intended by Congress, but at the same time deprives the State of legitimate and needed revenues for its citizens while benefiting the Tribe not at all.

The Court below had before it two questions of entirely disparate import and subject to totally different constitutional examinations; but nevertheless it combined the two questions as if they were one. First, the Court had to decide whether an Indian tribe could, on its own land and commensurate with modern federal policy, irrespective of state regulations to times, size of awards or number of games, engage in the lucrative retail business of high-stakes bingo. Secondly, the Court was asked to consider whether, regardless of the constitutional propriety of conducting such games, the Tribe should be excused from its legal duty as a commercial vendor to collect and remit state sales validly imposed upon its retail customers.

Having considered the rulings of this Court regarding the authority (or lack of authority) of the States to regulate or control the activities of Indian tribes on *reservations* within their borders, where the activity itself was not prohibited to others, the Court below essentially ended its inquiry, and found that the State had no regulatory control. The Court of Appeals went on, however, in a "quantum leap" to decide that if *regulation* of the activity was constitutionally denied to the State, then taxing the *customers* of the Tribe must somehow likewise be prohibited as an infringement on the internal workings of tribal government.

It is this latter concept, patently at odds with the prior decisions of this Court, for which Petitioner seeks review.

I. The State of Oklahoma may validly require the Muscogee (Creek) Nation and its corporate, non-Indian management company to collect and remit state sales taxes imposed upon the customers of the Tribe's bingo and other retail activites.

The State of Oklahoma provides governmental services, such as roads, maintenance, police protection, welfare assistance, etc., to the patrons of Creek Nation's Bingo hall right up to the front door of the establishment, located on a city street in Tulsa, Oklahoma. Inside the building those patrons are not taxpayers of the Creek Nation and receive no tribal government services. When they leave the hall, they again retrieve the benefits of State government and its institutions which, even while they were inside, provided them with a continuity of services which taxpayers have a right to expect. Creek Nation Bingo has provided them a commercial setting, commercial convenience and a commercial outlet to spend their money – just like any other business – but no government services.

The opinion below determined that the Tribe makes money from this enterprise, which it spends for the benefit of many tribal members; and a number of individual tribal members are employed by the enterprise who might not be employed at all. Upon these economic reasons, all benefits to the Tribe and its members, the Court below determined that the State and *its* citizens had an insignificant interest.

This reasoning conflicts with the rationale laid down by this Court in similar and, Petitioner submits, legally indistinguishable cases. In *Washington v. Conferdeated Tribes of Colville,* 447 U.S. 134, 100 S.Ct. 2069, 65 L.Ed.2d 10 (1980), this Court, in discussing the balancing of interests to be employed in determining whether state taxation of activities on Indian lands contravenes federal or constitutional proscriptions, stated:

> While the Tribes do have an interest in raising revenues for essential governmental programs, that interest is strongest when the revenues are derived from value generated on the reservation by activities involving the Tribes and when the taxpayer is the recipient of tribal services. The State also has a legitimate governmental interest in raising revenues, and that interest is likewise strongest when the tax is directed at off-reservation value and when the taxpayer is the recipient of state services. [Emphasis supplied.]

Id., 447 U.S., at pp. 157-158.

Here, the opinion below fixed its analysis on the language "value generated on the reservation[5]", to the exclusion of all else, namely: "Who is the taxpayer, and which governmental entity is providing the services to him?" Throught out all the proceedings and the record below there has never been any serious contention, and both the trial and appellate courts agree, that the taxes in question both legally and economically fall upon and are to be paid by the retail customer. Both courts also agree, nor was it otherwise ever contended, that the retail customers are members of the general public, few if any members of the Tribe, and 95% of whom are residents of the State of Oklahoma.

The opinion below ignores or attempts to avoid the pronouncements of this Court in the "special area of state taxation" of activities on Indian land. Both *Colville* and its precursor, *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463, 96 S.Ct. 1634, 48 L.Ed.2d 96 (1976), held that a state may validly impose upon an Indian tribe the "minimal burden" of collecting from its retail customers an otherwise valid non-discriminaotry excise tax which, as to the tribe, "is not * * * a tax at all," does not "run [ ] afoul of any congressional enactment dealing with the affairs of reservation enactment dealing with the affairs of reservation Indians," nor is there "[anything] in this burden which frustrates tribal self-government." *Id.*, 425 U.S., at p. 483. See also, *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 93 S.Ct. 1267, 36 L.Ed.2d 114 (1973).

As this Court announced in *Calidornia State Baord of Equalization v. Chemehuevi Indian Tribe*, 106 S.Ct. 289 (1985), Petitioner sumbits that the Tenth Circuit Court of Appeals in the opinion below, as did the Ninth Circuit in *Chemehuevi*, "applied a mistaken standard" in determining that the state retail sales tax could not here be applied. The opinion below relies hevily upon *California v. Cabazon Band of Mission Indians*, __ U.S.__, 107 S.Ct. 1083, 94 L.Ed.2d 244 (1987) to determine that Oklahoma may not regulate the activity of tribal bingo; but goes on to extend that case, erroneouly, to proscribe the imposition of state sales tax on the

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[5] The opinion previously affirmed the trial court's findings that the tract of land was a "reservation," a finding which Petitioner contests and discusses in Part II, *infra*.

general public customers of those bingo games. *Cabazon* again, contrary to the ruling espoused below, reiterated the prior holdings of this Court that "[t]he State's interest in assuring the collection of sales taxes from non-Indians enjoying the off-reservation services of the State was sufficient to warrant the minimal burden imposed" upon the tribal retailers. *Id.*

The decision below, conflicting as it does with the applicable decisions of this Court, should therefore be reviewed and reversed.

II. The decision of the lower court granting reservation status to the land upon which the Creek Nation Bingo enterprise is situated, is erroneous.

The opinion below engages in a thorough discussion of the history of the Creek Nation, analyzing treaties and acts of Congress leading up to the Tribe's present position in the State of Oklahoma. The result of this analysis led the Court to hold that there does exist an Indian reservation in Oklahoma.

Petitioner believes this analysis to be selective at best, and that the decision does not consider the relevant facts of this case that tend to show the non-existence of an Indian reservation located on the land in question referred to as "The Mackey Site."

The crux of the Tenth Circuit's holding regarding the Mackey site as a reservation is that this tract of land is within the reservation boundaries created by the Treaty of 1866, 14 Stat. 785; and since the Tribe has always owned this tract of land and Congress has never clearly expressed an intent to divest federal authority over the land, it remains a reservation to this day.

However, the opinion fails to reconcile the effects of the Curtis Act, 30 Stat. 495, and the General Allotment Act of 1901, 31 Stat. 661, with their final result. Under these Acts the Mackey site, now owned by the Tribe, was allotted to Louisa Mackey along with other land beside the Arkansas River in Tulsa County, Oklahoma. Subsequently, when oil was discovered in the area, the Tribe claimed title to the Arkansas River bed, up to the flood plain, in order to share in production royalties, and sued all the riparian land owners to quiet title. Although other riparian landowners prevailed against the Tribe, see *United States v. Hayes*, 20 F.2d 873 (8th Cir. 1927), the Mackeys settled with the Tribe and title to the Mackey site was quieted in the Tribe by the Decree filed July 13, 1925 in

United States v. Mackey, No. 1733 Equity (E.D.Okl. 1925). See A-58, 59. Since the title was quieted in the Tribe, the land was treated by the Court below as if the Tribe had always owned the land, thus enabling the Court to dismiss this chapter in the land's long history without mentioning it.

The purpose of the Allotment Act was to disestablish the reservation. To this end, the land in question was allotted and its reservation status was terminated at that point. Ever since the Allotment Acts, essentially no land in Oklahoma, including the Mackey site, has been administered or recognized as an Indian reservation either by the Bureau of Indian Affairs or the Congress of the United States.[6]

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[6]For example, the Senate report on the Oklahoma Indian Welfare Act of June 26, 1936, 49 Stat. 1967 (codified as amended at U.S.C., §§501-509 [1982]) contains the following:

> "After the Indians [in Oklahoma] were allotted lands of their selection, the balance of the several reservations were divided up into farms and disposed of to white settlers; hence, as a result of this program, *all Indian reservations as such have ceased to exist and the Indian citizen has taken his place on an allotment or farm and is assuming his rightful position among the citizenship of the State.*" S.Rep. No. 1232, 74th Cong. 1st Sess. 6 (1935). [Emphasis added.]

Similarly, in 1974 Congress amended the Federal Property and Administrative Services Act of 1949 [now codified in part at 40 U.S.C.§483(a)(2)]. The amendment as originally introduced authorized the Secretary of the Interior to accept federal surplus land in trust for Indian tribes or bands within whose reservation the land was located. In Committee, the Senate added the following proviso:

> "Provided, that such transfers of real property within the State of Oklahoma shall be made to the Secretary of the Interior to be held in trust for Oklahoma Indian tribes recognized by the Secretary of the Interior when such real property (1) is located within the boundaries of former reservations in Oklahoma as defined by the Secretary of Interior and when such real property was held in trust by the United States for an Indian tribe at the time of acquisition by the United States, or (2) is contiguous to real property held in trust by the United States for an Oklahoma Indian tribe and was at any time held in trust by the United States for an Indian tribe."

The particular facts of this case show that the Tribe acquired this land in a settlement conference arising out of a quiet title action in 1925. Petitioner suggests that it would be serious error to hold that an agreement reached by parties to a dispute over oil royalties could lead to the establishment of a reservation. Another peculiar aspect of this Indian reservation is that no Indians live there. In fact, since the land is located in the flood plain of the river, the surface acreage was unusable until the last 20 years, when flood control projects were built up-river. Now it is used only for commercial purposes by the Tribe.

In Oklahoma, the Curtis Act and the formation of the Dawes Commission had a substantial impact on the viability of all reservations in Oklahoma, leading to the disestablishment of the reservations by the Allotment Acts. The purpose of all of these Acts was to do away with the reservations in Oklahoma and move the Indians toward the mainstream of life. Although the federal policy that existed around the turn of the century when these Acts took place was later disavowed in the 1930's when the Indian Reorganization Act and the Oklahoma Indian Welfare Act were enacted under a new policy of tribal self-government, the later Acts did not replace what the Allotment Acts took away, namely, reservations in Oklahoma. If Congress has not acted to re-create reservations in Oklahoma, the opinion below, finding one by *default* of Congress, should not be allowed to stand. Such opinion should be reveiwed in light of congressional history and the applicable decisions of this Court.

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6 (footnote continued from page 8)

The Senate committee reported its reasoning to the full Senate:

> "This provision is necessitated by the fact that there are no reservations in Oklahoma. Without the provision added by this amendment the authority granted by H.R. 8958 would have no applicability to Oklahoma."

1974 U.S. Code Cong. & Admin. News, p. 7130.

While it is true that doubtful expressions in the law are to be construed in favor of the Indians, it is also true that such a canon of construction is not a license to disregard clear expressions of congressional intent. *De Coteau v. District County Court*, 420 U.S. 425 (1975).

CONCLUSION

These factors and the rulings below have significant and far-reaching legal, social and economic impact upon the government and citizens of the State of Oklahoma (indeed, upon *all* states with tribal populations within their borders); and upon the legitimate need of the American Indian and their tribal governments for guidance along the road to independence and self-determination.

The decision below not only is contrary to the prior rulings of this Court, but also seriously impedes the legitimate purposes of the State while conferring no real benefit upon the Tribe or its members. A writ of certiorari should therefore issue to review the decision of the Tenth Circuit Court of Appeals.

Respectfully submitted,

STANLEY P. JOHNSTON
Assistant General Counsel
Oklahoma Tax Commission
2501 Lincoln Boulevard
Oklahoma City, Oklahoma 73194
405) 521-3141

Attorney for Petitioner

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

INDIAN COUNTRY, U.S.A., INC., & MUSCOGEE (CREEK) NATION, Plaintiffs-Appellees, Cross-Appellants,	)	
vs.	)	
STATE OF OKLAHOMA ex rel. THE OKLAHOMA TAX COMMISSION & THE DISTRICT ATTORNEY OF TULSA COUNTY, Defendants-Appellants, Cross-Appellees.	)	No. 86-1819, 86-1832 & 86-1887

Appeal from the United States District Court for the Northern District of Oklahoma (D.C. No. 85-C-658-E)

M. Denise Graham, Assistant District Attorney, Tulsa, Oklahoma, and Robert C. Jenkins, Attorney for State of Oklahoma ex rel. the Oklahoma Tax Commission, for Defendants-Appellants.

John Echols (Lorraine Echols and Geoffrey M. Standing Bear, with him on the brief), Echols & Echols, Inc., Tulsa, Oklahoma, for Plaintiffs-Appellees.

Before SEYMOUR and BARRETT, Circuit Judges, and BROWN,* District Judge.

SEYMOUR, Circuit Judge.

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*Honorable Wesley E. Brown, Senior Judge, United States District Court for the District of Kansas, sitting by designation.

The Muscogee (Creek) Nation and Indian Country, U.S.A., Inc. (ICUSA) brought this suit for declaratory and injunctive releif against the State of Oklahoma in connection with the "Creek Nation Bingo" enterprise located on Creek Nation land known as the Mackey site." Plaintiffs alleged that the State could not lawfully regulate Creek Nation Bingo on tribal land or require the collection and remittance of state sales taxes on bingo activity sales. The district court agreed, concluding that state regulation and taxation are preempted and impermissibly interfere with tribal sovereignty. Accordingly, the court enjoined enforcement of state bingo laws and the state sales tax. The court also dismissed ICUSA as a party, concluding that the Tax Injunction Act, 28 U.S.C. § 1341 (1982), bars ICUSA's action to enjoin the collection of state taxes.

On appeal, the state contends that the Creek Nation lands are not "Indian country," and that even if they are, the State nevertheless has complete civil and criminal jurisdiction over the site, including the authority to regulate and tax Creek Nation Bingo activities. On cross-appeal, the Tribe and ICUSA contend that ICUSA should not have been dismissed from the suit.[1] We affirm in part and reverse in part.

This case involves the authority of the State of Oklahoma to regulate and tax certain bingo and bingo–related activities conducted on treaty lands still held by the Creek Nation. Although portions of our inquiry are guided by *California v. Cabazon Band of Mission Indians*, 107 S.Ct. 1083 (1987), which held state regulation of Indian bingo on reservation land to be preempted, and by our conclusion that these lands are Indian country, this case presents additional issues arising from the unique history of relations between the United States and the "Five Civilized Tribes" in the

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[1] The Tribe and ICUSA also contend that a related state court proceding, brought by the State after this suit was filed and initially removed to federal court, was improperly remanded. The district court remanded the state action because it believed itself to be without jurisdiction. A district court order remanding a case as "removed improvidently and without jurisdiction," 28 U.S.C. §1447(c) (1982), is "not reviewable on appeal or otherwise," *id.* §1447(d), "whether erroneous or not," *Thermtron Prods., Inc. v. Hermansdorfer*, 423 U.S. 336, 343 (1976). We are thus without jurisdiction to review this contention.

former "Indian Territory."[2] Because of the complex history of the Indian Territory and the numerous federal laws governing the Indians of Oklahoma, we emphasize that our inquiry is limited to the State's authority with respect to bingo conducted on Creek Nation lands. We begin by reviewing briefly the status and history of the Creek Nation and its tribal lands, and the nature of the Creek Nation Bingo enterprise.

I.
BACKGROUND

A. Creek Nation and Relationship with Federal Government

The Creek Nation is a federally recognized Indian tribe located in what is today eastern Oklahoma. In 1979, the Creeks reorganized their tribal government under section three of the Oklahoma Indian Welfare Act, 25 U.S.C. § 503 (1982), and adopted a new Creek Constitution, which was approved by the Untied States Department of the Interior. *See* Brief of Appellees, exh. C. The present constitution, like the 1867 constitution it replaced, organizes the tribal government into executive, legislative, and judicial branches.

The special government-to-government and protectorate relationship continues to exist between the Creek nation and the United States. In 1943, long after the historical events that form the center of controversy in the present case, a unanimous Supreme Court stated that "Congress has not terminated that [guardianship] relation with respect to the Creek Nation and its members." *Board of County Comm'rs v. Seber*, 318 U.S. 705, 718 (1943); *cf. Northern Arapahoe Tribe v. Hodel*, 808 F.2d 741, 749-50 (10th Cir. 1987) (federal protectorate and trust relationship with Indian tribes). The Court in *Seber* concluded that the Creek Nation "still exists," 318 U.S. at 718, and that under the Oklahoma Indian Welfare Act of 1936, 25 U.S.C. §§501-509 (1982), the Tribe was

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[2] The Cherokees, Chickasaws, Choctaws, Creeks, and Seminoles historically have been referred to as the "Five Civilized Tribes." Although most of what is today Oklahoma was once the "Indian Territory," after the creation of Oklahoma Territory in 1890, the phrase referred to the eastern portion of present-day Oklahoma encompassing the lands of the Five Civilized Tribes, plus lands of other tribes situated in the extreme northeastern corner of the state.

"authorized to resume some of its former powers," *Seber*, 318 U.S. at 718.

B. Creek Nation Lands in Oklahoma

During the eighteenth and early nineteenth centuries, the Creek Nation occupied a large domain within the present states of Alabama and Georgia. *See* A. Debo, The Road to Disappearance 3 (1979 revised reprint) (orig. publ. 1941) [hereinafter Road to Disappearance]. In the 1820's, the federal government adopted a policy to forcibly remove the Five Civilized Tribes from the southeastern Untied States and relocate them west of the Mississippi River, in what is today Oklahoma. *See Harjo v. Kleppe*, 420 F. Supp. 1110, 1119 (D.D.C. 1976), *aff'd sub. nom. Harjo v. Andrus*, 581 F.2d 949 (D.C. Cir. 1978). In a treaty concluded in 1832, the Creeks ceded their eastern homelands to the United States, in exchange for lands west of the Mississippi River. *See* Treaty, Mar. 24, 1832, United States – Creek Tribe of Indians, 7 Stat. 366 (Treaty of 1832). Article fourteen of the treaty provided that

> "[t]he Creek country west of the Mississippi shall be solemnly guarantied to the Creek Indians, nor shall any State or Territory ever have a right to pass laws for the government of such Indians, but they shall be allowed to govern themselves, so far as may be compatible with the general jurisdiction which Congress may think proper to exercise over them."

Id., art. 14, 7 Stat. at 368; *cf. Choctaw Nation v. Oklahoma*, 397 U.S. 620, 625-26 (1970) (similar treaties with Choctaws and Cherokees). In a subsequent treaty regarding these lands, the United States agreed to grant "a patent, in fee simple, to the Creek Nation." Treaty, Feb. 14, 1833, United States – Creek Nation, art. 3, 7 Stat. 417, 419 (Treaty of 1833); *see also Woodward v. De Graffenried*, 238 U.S. 284, 293 (1915) (patent issued to Creek Nation in 1852, vesting title in tribe).

In 1856, the Creeks agreed to cede to the Seminole Tribe a portion of their lands. *See* Treaty, Aug. 7, 1856, United State –Creek and Seminole Tribes, 11 Stat. 699 (Treaty of 1856). With

respect to the lands still held by the Creek Nation, the United States guaranteed the "same title and tenure" as promised and secured under the 1832 and 1833 treaties. *Id.*, art. 3, 11 Stat. at 700. The 1856 treaty reaffirmed that "no State or Territory shall ever pass laws for the government of the Creek or Seminole tribes of Indians," and the United States pledged that "no portion of either of the tracts of country defined in [the treaty] shall ever be embraced or included within, or annexed to, any Territory or State." *Id.*, art. 4, 11 Stat. at 700.

Ten years later, following the Civil War, the Tribe was forced to cede the western portion of its domain. *See* Treaty, June 14, 1866, United States – Creek Nation, 14 Stat. 785 (Treaty of 1866). The Creek Nation retained title to its "reduced . . . reservation," *Id.* art. 9, 14 Stat. at 788, which was promised to be "forever set apart as a home for said Creek Nation," *Id.* art. 3, 14 Stat. at 786. In consideration for the lands ceded, the United States promised monetary payments "to enable the Creeks to occupy, restore, and improve their farms, and to make their nation independent and self-sustaining." *Id.* at 786-87. The Creeks agreed to permit federal legislation as necessary to protect persons and property within Indian Territory, bu the treaty provided that "said legislation shall not in any manner interfere with or annul their present tribal organization, rights, laws, privilege, and customs." *Id.*, art. 10, 14 Stat. at 788. Finally, the United States reaffirmed and reassumed all consistent prior treaty obilgations toward the Creek Nation. *See id.*, art. 12, 14 Stat. at 790.

By the 1880s, however, assimilationist policies and the influx of whites into Creek territory resulted in pressure on Congress to extinguish tribal title, allot the land to individual Creeks giving them alienable title, dispose of "surplus" lands to non-Indians, and eventually create a new state. Subsequent agreements and federal legislation, intended to implement these plans, thus resulted in further reduction of the tribally-owned lands of the Creek Nation. Nevertheless, certain lands in eastern Oklahoma lying within the exterior boundaries of the 1866 Creek reservation are still owned by the Creek Nation pursuant to the patents and promises dating back to the treaties. It is a tract of that tribal land, on which Creek Nation Bingo is located, which is involved in the present suit.

C. Creek Nation Bingo

The Creek Nation operates bingo games on a tribally-owned tract of treaty land known as the "Mackey site," containing approximately one hundred acres along the Arkansas River in Tulsa County, Oklahoma. Creek Nation Bingo, the enterprise itself, is managed by Indian Country, U.S.A., Inc. (ICUSA), a non-tribal entity. ICUSA manages the games pursuant to a "Management Agreement" made between it and the Tribe, and specifically approved by the Creek National Council and the federal Bureau of Indian Affairs. *See rec.*, vol. V, at 143 (testimony of Nelson Johnson, Deputy Comm'r, Creek Nation Gaming Comm'n); Brief of Appellees, exh. 2-A.

The bingo operations are licensed by the Tribe, supervised by the Creek Public Gaming Commissioner, and required to comply with a comprehensive gaming ordinance enacted by the Tribe. Under the Management Agreement, ICUSA has agreed to submit to the jurisdiction of the Court of the Muscogee (Creek) Nation, which was established under Article VII of the 1979 Creek Constitution. The Agreement also contains a limited waiver of sovereign immunity by the Tribe for dusputes arising between ICUSA and the Tribe.

The bingo games are open to the public. *See* rec., vol. V, at 251-52 (testimony of William Foster, Comm'r of Gaming, Creek Nation). Approximately ninety-five percent of the bingo players are residents of Oklahoma. *See Id.* at 251-52, 274. Most are from the Tulsa area. *See Id.* Although the enterprise keeps records of the residence of players, the general manager testified that he did not know what percentage of players are not Creek citizens. *See Id.*, vol. VI, at 455 (testimony of Gordon Sjodin, General Manager, Creek Nation Bingo). In addition to the bingo games themselves, the facilities contain food services for patrons. Creek Nation Bingo also sells bingo supplies and accessories.

Creek Nation Bingo provides a source of employment for members of teh Creek Nation. Approximately eighty percent of its employees are Creeks, and approximately seventeen percent are members of other Indian tribes. Recent statistics indicate an unemployment rate among Creeks residing in eastern Oklahoma at twenty percent or higher. *See Id.*, vol. V, at 144 (testimony of Nelson Johnson); *id.*, vol. IV, at 75-76 (testimony of Gary

Breshears, Exec. Dir., Office of Admin., Creek Nation). Tribal revenues derived from Creek Nation Bingo are used to support tribal operations and tribal health and social services programs.

The State of Oklahoma licenses and regulates by does not prohibit bingo. *See* Okla. Stat. tit. 21, §§ 995.1-995.18 (1981 & Supp. 1986). It does, however, prohibit high-stakes commerical bingo. *See* Brief of Appellants, at 26. Neither the Creek Nation nor ICUSA has obtained a state bingo license for Creek Nation Bingo, which does not purport to operate in compliance with state law. The enterprise also does not collect state sales tax on bingo ticket sales nor on concessions or other sales.

II.
THE MACKEY SITE AS INDIAN COUNTRY

The district court concluded that the Mackey site, on which Creek Nation Bingo is located, is "Indian country", as defined in 18 U.S.C. §1151(a) (1982). Section 1151 defines Indian country to include "all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and including rights-of-way running through the reservation." *Id.* §1151(a). Although section 1151 by its terms defines Indian country for purposes of determining federal criminal jurisdiction, the classification generally applies to questions of both civil and criminal jurisdiction. *See Cabazon*, 107 S.Ct. at 1087 n.5. Numerous cases confirm the principle that the Indian country classification is the benchmark for approaching the allocation of federal, tribal, and state authority with respect to Indians and Indian lands. *See, e.g., id.; Solem v. Bartlett*, 465 U.S. 463, 465 n.2 (1984); *DeCoteau v. District County Court*, 420 U.S. 425, 427-28 & n.2 (1975); *Kennerly v. District Court*, 400 U.S. 423 (1971); *Cheyenne-Arapaho Tribes of Oklahoma v. Oklahoma*, 618 F.2d 665 (10th Cir. 1980); *see also* Cohen's Handbook of Federal Indian Law 27-46 (R. Strickland ed. 1982) [hereinafter Cohen's Handbook] ("Indian country" ususally the governing legal term for jurisdictional purposes); F. Cohen, Handbook of Federal Indian Law 5-8 (1942) ("Indian country" generally determines allocation of tribal, federal, and state authority). We note that the Supreme Court of Oklahoma has also recognized the importance of this classification:

> "The touchtone for allocating authority among the various governments has been the concept of 'Indian Country,' a legal term delineating the territorial boundaries of federal, state and tribal jurisdiction. Historically, the conduct of Indians and interests in Indian property within Indian Country have been matters of federal and tribal concern. Outside Indian Country, state jurisdiction has obtained."

Ahboah v. Housing Auth. of the Kiowa Tribe, 660 P.2d 625, 627 (Okla. 1983); *see State ex rel. May v. Seneca-Cayuga Tribe of Oklahoma*, 711 P.2d 77, 79-82 & n. 26 (Okla. 1985) (recognizing relevance of Indian country classification in eastern Oklahoma, formerly Indian Territory).

The State contends on appeal that the Mackey site is not Indian country because it is not a "reservation," nor is the fee title held in trust by the federal government for the Creek Nation. For the reasons set out below, we conclude that under both historical and contemporary definitions, the Mackey site has retained its status as Indian country and land reserved under the jurisdiction of the federal government and the Tribe.

The term "Indian reservation" has been used in various ways to define Indian country. *See generally* Cohen's Handbook at 34-38. Gradually the term has come to describe "federally-protected Indian tribal lands," *Id.* at 35 n.66, meaning those lands which Congress has set apart for tribal and federal jurisdiction. *Cf. Solem*, 465 U.S. at 468-69 (Indian reservation historically considered coextensive with tribal ownership; subsequently term has been expanded in meaning). Thus, for purposes of defining Indian country, the term simply refers to those lands which Congress intended to reserve for a tribe and over which Congress intended primary jurisdiction to rest in the federal and tribal governments.

A formal designation of Indian lands as a "reservation" is not required for them to have Indian country status. *See United States v. McGowan*, 302 U.S. 535, 538-39 (1938) (Congress' intent controls for determining Indian country; designation as a "colony" or "reservation" immaterial); *see also United States v. Chavez*, 290 U.S. 357, 364 (1933) (Indian country includes "any

unceded lands owned or occupied by an Indian nation or tribe"); *cf. United States v. John*, 437 U.S. 634, 649 (1978) (trust status created "reservation"); *Santa Rosa Band of Indians v. Kings County*, 532 F.2d 655, 657 (9th Cir. 1975), *cert. denied*, 429 U.S. 1038 (1977) (California rancherios are Indian reservations). Moreover, the past failure to challenge Oklahoma's jurisdiction over Creek Nation lands, or to treat them as reservation lands, does not divest the federal government of its exclusive authority over relations with the Creek Nation or negate Congress' intent to protect Creek tribal lands and Creek governance with respect to those lands. *See John*, 437 U.S. at 652-53; *see also Ute Indian Tribe v. Utah*, 773 F. 2d 1087, 1089 n.1 (10th Cir. 1985) (enbanc), *cert. denied* 107 S.Ct. 596 (1986). "[I]t is Congress' intent that must govern our decision." *Id.; cf. Solem*, 465 U.S. at 479 n.23 (State courts assumed that opened areas of reservation fell within their general jurisdiction; Supreme Court held that reservation boundaries not diminished).

As recounted above, the country in the Indian Territory provided for the Creek nation was granted to it in fee simple. The treaties between the United States and the Creek Nation expressly recognized and preserved the Tribe's title and its right of self-government over its lands, and explicitly promised that the Creek country would remain immune from state or territorial laws. *See* Treaty of 1866, arts. 10, 12, 14 Stat. at 788, 790; Treaty of 1856, arts. 3, 4, 15, 11 Stat. at 700, 703-04; Treaty of 1832, art. 14, 7 Stat. at 368.

Historically, it is clear that Creek Nation lands were Indian country, subject only to tribal and federal jurisdiction. *See* Trade & Intercourse Act, ch. 161, §1, 4 Stat. 729 (1834). The treaties of 1832 and 1833 promised the Creeks a country west of the Mississippi River that would be set aside for their nation, held under a communal fee title. The Treaty of 1866 provided that the "reduced . . . reservation" retained by the Creeks was "forever set apart as a home for the Creek Nation." Arts, 3, 9, 14 Stat. at 786, 788. These tribally-owned lands were "devoted to Indian occupancy, . . . validly set apart for the use of the Indians." *United States v. Pelican*, 232 U.S. 441, 449 (1914) (defining Indian country); *See John*, 437 U.S. at 648-49 (*Pelican* formulation the "principal test"). In 1890, when Congress created Oklahoma Territory, the lands of the Five Civilized Tribes, including the

Creeks, remained Indian Territory. *See* Oklahoma Territory Organic Act, ch. 182, §§1, 29, 26 Stat. 81, 93 (1890). No terri-torial government was ever created in the reduced Indian Territory, and it remained subject directly to tribal and federal governance. *See Jefferson v. Fink*, 247 U.S. 288, 290-91 (1918); *Southern Surety Co. v. Oklahoma*, 241 U.S. 582, 584 (1916).

Because the "Constitution vests the Federal Government with exclusive authority over relations with Indian tribes," *Montana v. Blackfeet Tribe*, 471 U.S. 759, 764 (1985), Congress has the authority to define "Indian country" broadly and to exclude state jurisdiction within the defined area. *See United States v.Mazurie*, 419 U.S. 544, 555 (1975). Once Congress has set lands apart as Indian country, they remain so until Congress divests them of that character. In a related context, the Supreme Court has recognized that "only Congess can divest a reservation of its land and diminish its boundaries," and "[o]nce a block of land is set aside for an Indian reservation . . . the entire block retains its reservation status until Congress explicity indicates otherwise." *Solem*, 465 U.S. at 470 (citing *United States v. Celestine*, 215 U.S. 278, 285 (1909)). Considering Congress' clearly expressed intent that Creek Nation lands be set apart for the Creeks and be immune from state laws, we believe that divestiture of that federal and tribal authority over these lands "would require an equally clear expression of congressional intent." *Ute Indian Tribe*, 773 F.2d at 1088; *cf.* Cohen's Handbook at 27 ("Indian tribal territory has always held a separate status under federal law"). In the present case, we need not decide whether the exterior boundaries of the 1866 Creek Nation have been disestablished.[3] Instead, because title to the Mackey site is still held by the Creek Nation, we need only decide whether Congress has explicitly acted to divest Creek tribal lands of their Indian country status and to divest itself of jurisdictional authority over such lands.

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[3] The State seems to believe that the Indian country status of the Mackey site rests on whether the exterior boundaries of the 1866 Creek reservation have been disestablished. It does not. Our inquiry is narrower: whether Congress has divested the unallotted Creek tribal lands of their Indian country status. The disestablishment question is primarily important for determining the status of *non-Indian* lands, which remain Indian country under 18 U.S.C. §1151(a) until the surrounding portion of a reservation is disestablished. Tribal lands, trust lands, and certain allotted lands generally remain Indian country despite disestablishment. *See, e.g., Solem*, 465 U.S. at 467 n.8; *DeCoteau*, 420 U.S. at 428.

In the present case, the treaties effectively reserved these lands for the Creek Nation and promised immunity from state laws. The Treaty of 1866 explicitly referred to the retained lands as the "reduced Creek reservation." Art. 9, 14 Stat. at 788. Although the State points to various acts of Congress that preempted Creek tribal authority with federal authority and that reduced the tribal land base through allotment and the disposition of "surplus" lands, the State has shown us no act of Congress that explicitly – or even implicitly – divested the remaining Creek tribal lands of their Indian country status. To the contrary, the Oklahoma Enabling Act expressly preserved federal authority over Indians and their lands and property. *See* Oklahoma Enabling Act, ch. 3335, §1, 34 Stat. 267, 267-68 (1906); *Tiger v. Western Inv. Co.*, 221 U.S. 286, 309 (1911). Four years after statehood, the court in *United States Express Co. v. Friedman*, 191 F. 673 (8th Cir. 1911), explicity rejected the broad contention "that the portion of Oklahoma formerly called the Indian Territory ceased to be Indian country upon admission of Oklahoma as a state." *Id.* at 678-79. After reviewing the enabling act and the 1906 legislation continuing the tribal governments, the court noted that in 1910, the Five Civilized Tribes "in their tribal capacity owned about 3,000,000 acres or more of land," *id.* at 679, and concluded that "[i]t would indeed be difficult to show how this land ceased to be Indian country," *id.* In addition, we note that in 1924, seventeen years after statehood, Congress still referred to the lands of the Five Civilized Tribes as included in the generic category of "Indian reservations." *See* Act of May 29, 1924, ch. 210, 43 Stat. 244 (codified at 25 U.S.C. § 398 (1982)) (provisions apply to "[u]nallotted land on Indian reservations other than lands of the Five Civilized Tribes and the Osage Reservation").

The unusual nature of Creek Nation title to the Mackey site does not alter our conclusion, contrary to the State's suggestion that Indian fee title and "reservation" status under section 1151(a) are somehow inconsistent. In *United States v. Chavez*, the Supreme Court recognized that the Pueblo of Isleta's "communal ownership of the full title in fee simple" is not an obstacle to federal protection of the Indian lands. 290 U.S. at 363. Patented fee title is likewise not an obstacle to either reservation or Indian country status of Creek Nation lands. The federal government's role as guaradian and protector of Creek lands was recognized by the Supreme Court long

after Oklahoma became a state. *See United States v. Creek Nation*, 295 U.S. 103, 109 (1935). Indeed, it would be anomalous to adopt the State's position suggesting that the treaties conferring upon the Creek Nation a title *stronger* than the right of occupancy have left the tribal land base with *less* protection, simply because fee title is not formally held by the Untied States in trust for the Tribe.[4]

In summary, the Mackey site is part of the original treaty lands still held by the Creek Nation, with title dating back to treaties concluded in the 1830s and patents issued in the 1850s. These lands historically were considered Indian country and still retain their reservation status within the meaning of 18 U.S.C. §1151(a). The district court thus correctly concluded that in many respects the "Mackey site is the purest form of Indian Country; . . . set apart for the use and benefit of the Creek Nation." Rec., vol. I, doc. 106, at 11.

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[4] The State takes the position that because the Creek Nation government was never terminated as had once been envisioned, fee title to tribal lands never formally passed to the United States "in trust" for the Tribe, as provided by the Act of April 26, 1906, §27, 34 Stat. 137, 148. *See* Brief of Appellants, at 11. Title in the Creek Nation, however, is not inconsistent with the evidence presented at trial that the federal government considers Creek tribal lands to be "trust lands." *See e.g.*, rec. , vol. II, at 88, 107-08 (testimony of Rennard Strickland); Id. at 112-13 (Bureau of Indian Affairs memo referring to unallotted Creek land as being held in trust by the United States).

Regardless of who holds fee title, the United States has assumed certain obligations to protect and preserve Creek Nation lands. *See, e.g., United States v. Hayes*, 20 F.2d 873, 875 (8th Cir. 1927) (United States, as guardian and trustee of Creek tribal property, brought suit on Tribe's behalf); *see also United States v. Creek nation*, 295 U.S. 103, 109-110 (1935) (guardianship of the United States extends to Creek Nation's property and affairs); *cf. United States v. Burnett*, 777 F.2d 593 (10th Cir. 1985) (federal supervisory control the "essential quality" making Osage allotment "Indian country"), *cert. denied*, 106 S.Ct. 1952 (1986). In addition, Indian tribal lands in general are protected against conveyance, absent congressional consent. *See* 25 U.S.C. §177 (1982); *County of Oneida v. Oneida Indian Nation of New York State*, 105 S. Ct. 1245, 1250 (1985); *see also Mohegan Tribe v. Connecticut*, 638 F.2d 612, 621 (2d Cir. 1980), *cert. denied*, 452 U.S. 968 (1981). It is this clear that trust obligations assumed by the United States with respect to Indian lands are not inconsistent with fee title in the Tribe.

III.
STATE AUTHORITY TO REGULATE CREEK NATION BINGO

The Supreme Court "has consistently recognized that Indian tribes retain 'attributes of sovereignty over both their members and their territory,'. . . and that 'tribal sovereignty is dependent on, and subordinate to, only the Federal Government, not the States.'" *Cabazon*, 107 S.Ct. at 1087 (quoting *Mazurie*, 419 U.S. at 557, and *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 154 (1980)); *see New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 331-33 (1983); *see also State of Washington, Dep't of Ecology v. EPA*, 752 F.2d 1465, 1469-70 (9th Cir. 1985). There is a presumption against state jurisdiction in Indian country. *See Cabazon*, 107 S.Ct. at 1092 n.18; *see also Cheyenne-Arapaho Tribes*, 618 F.2d at 668; *cf. Montana v. United States*, 450 U.S. 544, 557 (1981); *see generally* C. Wilkinson, American Indians, Time, and the Law 93-106 (1987). Nevertheless the Court also has recognized that state laws may reach into Indian country "if Congress has expressly so provided." *Cabazon*, 107 S.Ct. at 1087. In addition, a state may validly assert such jurisdiction even absent express consent in very limited circumstances. *See id.* at 1091.

A. Pre-statehood Legislation and Enabling Act

The State contends that upon admission to statehood, it acquired complete jurisdiction over members of the Five Civilized Tribes and their lands within the former Indian Territory. The State relies on a combination of federal legislation enacted prior to statehood and language in the Oklahoma Enabling Act. Oklahoma contends that the enabling act required it to disclaim a proprietary but not jurisdictional interest in Indian lands. It also contends that because the state courts succeeded the special United States court in the Indian Territory with respect to certain cases, the state thereby acquired complete jurisdiction over Indians and their lands. We are not persuaded. We begin our discussion by reviewing the history and context of the legislation relied upon by the State.

As discussed earlier, following the Civil War the United States forced the Creek Nation to cede the western portion of its lands. *See*

Treaty of 1866, 14 Stat. 785. As to the lands retained, the United States guaranteed the Creek Nation quiet possession, set the lands apart forever as the home of the Creek Nation, recognized the tribe's governmental authority, and reaffirmed all prior consistent treaty obligations. *See Id.*, arts. 1, 3, 10, 12, 14 Stat. at 786, 788-90. In 1867 the Creeks adopted a constitution and began rebuilding their nation within their reduced territory. *See generally* Road to Disappearance at 177-213. In 1890, they "exercised within a defined territory the powers of a sovereign people; having a tribal organization, their own system of laws, and a government with . . . executive, legislative, and judicial [branches]." *Turner v. United States*, 248 U.S. 354, 355 (1919).

During the 1880s and 1890s, the white population within the indian Territory grew dramatically. *See Harjo*, 420 F. Supp. at 1121. As the number of whites in the territory increased, so did problems of lawlessness. The Indian courts of the Five Civilized Tribes only exercised jurisdiction over citizens of the tribe. Because the Indian courts did not have jurisdiction over non-citizen whites and the federal courts had only limited jurisdiction, serious problems developed in resolving criminal and civil disputes involving the Indians and these interlopers. *See id.* at 1121. Additionally, the white newcomers were frustrated by the communal tenure of the Indian lands, and pressured Congress to break up the tribal land base, attach freely alienable individual title to the land, and eventually create a new state. *See id.*

In 1889, Congress created a special federal court of limited jurisdiction in the Indian Territory, which at that time encompassed most of present-day Oklahoma. *See* Act of March 1, 1889, ch. 333, 25 Stat. 783. The following year, Congress carved the Territory of Oklahoma out of the western half of the Indian Territory.*See* Oklahoma Territory Organic Act, §1, 26 Stat. at 81. The lands in the east held by the Five Civilized Tribes remained Indian Territory, subject only to federal and tribal authoirty. *See id.* §29, 26 Stat. at 93. Because of continuing jurisdictional difficulties, Congress expanded the civil and criminal jurisdiction of the special United States court in the diminished Indian Territory. *See id.* §§29, 30, 26 Stat. at 93-94. The act also provided that "certain general laws of the State of Arkansas . . . which are not locally inapplicable or in conflict with this act or with any law of Congress . . . are hereby extended over and put in force in the Indian Territory." *Id.* §31, 26

Stat. at 94-95. The tribes, however, retained exclusive jurisdiction over all civil and criminal disputes involving only tribal members, and the incorporated laws of Arkansas did not apply to such cases. *See id.* §30, 26 Stat. at 94.

In 1893, reflecting federal policies to forcibly assimilate Indians into the non-Indian culture and to eventually create a new state in the Indian Territory, Congress created the Dawes Commission to negotiate with the Five Civilized Tribes to extinguish tribal land title and develop an allotment plan. *See Harjo*, 420 F. Supp. at 1122. Six years earlier, Congress had passed the General Allotment Act of 1887, ch. 119, 24 Stat. 388, but had expressly exempted the Five Civilized Tribes, *id.*, §8, 24 Stat. at 391. Because of the treaty-based fee patents held by these tribes, Congress initially believed that tribal consent was a prerequisite to individual land allotment. *See Woodward*, 238 U.S. at 294, 304-05.

The Five Civilized Tribes, however, refused to negotiate with the Dawes Commission, and Congress – still unsure of the scope of its authority to forcibly dispose of tribal lands – began to force the issue by placing restrictions on the Indian governments and expanding federal jurisdiction within Indian Territory. Prior to 1897, the Indian courts had exclusive jurisdiction over disputes involving members of the same tribe. In 1897, Congress enacted legislation providing that the body of federal law in Indian Territory, which included the incorporated Arkansas laws, was to apply "irrespective of race." *See* Appropriations Act of June 7, 1897, ch. 3, 30 Stat. 62, 83. In the same act, Congress broadened the jurisdiction of the federal courts, thus divesting the Creek tribal courts of their exclusive jurisdiction over cases involving only Creeks. The 1897 law also subjected Creek legislation to presidential veto, further restricting the authority of the Creek Nation to govern its territory and apply its laws. *See id.* at 84. A year later, the Curtis Act abolished the existing Creek court system and rendered then-existing tribal laws unenforceable in the federal courts. *See* Curtis Act, ch. 517, §§26, 28, 30 Stat. 495, 504-05 (1898). This legislation, intended among other things to coerce the Creek Nation to agree to allotment and cession of tribal lands, federally preempted existing Creek laws, abolished the Creek courts, and made future Creek legislation subject to federal approval and oversight.

In 1901, the Creek Nation finally agreed to the allotment of

tribal lands. *See* Original Creek Agreement, ch. 676, 31 Stat. 861 (1901); Supplemental Creek Agreement, ch. 1323, 32 Stat. 500 (1902). Although the vast majority of Creek Nation lands were allotted or sold, some lands remained in tribal ownership under the original treaty-based fee patents. In 1906, still envisioning the future dissolution of the tribal governments, Congress provided that upon such dissolution, title to the unallotted communal lands still held by the Five Civilized Tribes would pass to the United States in trust for the respective tribes. *See* Five Tribes Act of 1906, ch. 1876, §27, 34 Stat. 137, 148. In the same act, however, Congress expressly delayed any plans to terminate the tribes, and provide that the tribal governments "are hereby continued in full force and effect." *See id.* §28, 34 Stat. at 148; *see also Harjo*, 420 F. Supp. at 1129 (Congress extended tribal governments "over the strenuous objections of the Secretary of the Interior"). The legislation also continued to place restrictions on Creek legislative authority by requiring presidential approval of tribal legisation. *See* Five Tribes Act of 1906, §28, 34 Stat. at 148.

Two months after enacting the Five Tribes Act, Congress passed an enabling act to permit the people of the Oklahoma and Indian territories to form a state. *See* Oklahoma Enabling Act, ch. 3335, 34 Stat. 267 (1906); Enabling Act Amendment, ch. 2911, 34 Stat. 1286 (1907). The enabling act provided that federal Article III courts would succeed the special United States court in the Indian territory with respect to all cases arising under the Constitution, laws, or treaties of the United States. *See* Enabling Act Amendment, §1, 34 Stat. at 1286-87 (amending §16 of Oklahoma Enabling Act). The state courts created upon statehood were to succeed the Indian Territory courts with respect to the remaining nonfederal cases. *See id.* §§2, 3, 34 Stat. at 1287 (amending §§17 and 20 of Oklahoma Enabling Act). The enabling act also provided that "the laws in force in the Territory of Oklahoma, *as far as applicable*, shall extend over and apply to said State." Oklahoma Enabling Act, §13, 34 Stat. at 275 (emphasis added). Finally, the enabling act preserved the authority of the federal government over Indians and their lands, and required the State to disclaim "all right and title" to such lands. *See id.* §§1, 3, 34 Stat. at 267-68, 270.

Although the federal legislation described above seriously undermined the authority of the Creek Nation, we are not persuaded that Congress intended or acted to completely abolish Creek Nation jurisdiction over tribal lands, to divest the federal government of its

authority, or to permit the assertion of jurisdiction by the State of Oklahoma.

In *United States v. Ramsey*, 271 U.S. 467 (1926), the Supreme Court recognized that upon Oklahoma's admission to statehood in 1907, federal authority ended with regard to non-Indians. *See id.* at 469. The Court also stated, however, that because of the unique relationship between the federal government and Indian tribes, federal authority continued with regard to Indians. *See id.* In the context of a case involving Creek allotted lands, the Supreme Court stated that "[i]n passing the enabling act for the admission of the state of Oklahoma . . . Congress was careful to preserve the authority of the government of the United States over the Indians, their lands and property, which it had prior to the passage of the act." *Tiger*, 221 U.S. at 309; *see* Oklahoma Enabling Act, §1, 34 Stat. at 267. Even in the Creek Allotment Agreement, Congress expressly reaffirmed prior consistent treaty obligations with the Creek Nation. *See* 31 Stat. at 872 (provision no. 44). Those obligations included the promise that the lands owned by the Creek Nation would be protected from state laws. Nothing in the supplemental allotment agreement or in subsequent legislation is inconsistent with the preservation of federal and tribal jurisdiction over these lands.

The State argues that the wording of the disclaimer contained in section three of the enabling act differs from disclaimers required of other states and evinces congressional intent to permit the state to assert broad jurisdiction over Indian lands. The relevant portion of section three of the Enabling Act reads as follows:

> "That the people inhabiting said proposed State do agree and declare that they forever disclaim all right and title in or to any unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indian, tribe, or nation; and that until the title to any such public land shall have been extinguished by the United States, the same shall be and remain subject to the jurisdiction, disposal, and control of the United States."

Oklahoma Enabling Act, §3, 34 Stat. at 270. The State asserts that section three required a disclaimer only of a proprietary interest in Indian lands, and reserves federal jurisdiction only for "public lands." The State points to enabling acts for other states that contain similar clauses, but which provide that "said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States." *See, e.g.*, Act of Feb. 22, 1889, ch. 180, §4, 25 Stat. 676, 677 (enabling act for North Dakota, South Dakota, Montana, and Washington).

We reject the State's interpretation of Oklahoma's enabling act because the State's construction completely ignores the effect of section one of the act, in which Congress explicitly preserved federal authority. Section one provides that

> "nothing contained in the said constitution shall be construed to limit or impair the rights of person or property pertaining to the Indians of said Territories (so long as such rights shall remain unextinguished) or to limit or affect the authority of the Government of the United States to make any law or regulations respecting such Indians, their lands, property, or other rights by treaties, agreement, law or otherwise, which it would have been competent to make if this Act had never been passed."

Oklahoma Enabling Act, §1, 34 Stat. at 267-68. Section one is a general reservation of federal and tribal jurisdiction over "Indians, their lands, [and] property," except as extinguished by the tribes or the federal – not state – government.

Sections one and three of the act, read in pari materia, cannot be read as a clear expression of congressional intent to disclaim federal or tribal jurisdiction over unallotted Creek tribal lands, such as those at issue in the present suit. Singificantly, the enabling acts that the State attempts to distinguish from the Oklahoma Enabling Act contain no provision that parallels section one. *See, e.g.*, Act of Feb. 22, 1889, 25 Stat. 676. The language of the Oklahoma act, read in its historical context, suggests that Congress intended to preserve its jurisdiction and authority over Indians and their lands in the new State of Oklahoma until it accomplished the eventual goal of terminating the tribal governments, assimilating the Indians, and dissolving completely the tribally–owned land base–events that

never occurred and goals that Congress later expressly repudiated. The State has failed to cite any acts of Congress that clearly reveal an intent to divest the federal and tribal governments of jurisdiction over Creek tribal lands and to confer such authority on the State of Oklahoma.[5]

Our interpretation of Oklahoma's Enabling Act is consistent with the way in which Congress interpreted the act in 1953 when it addressed the matter of state jurisdiction over Indian country. In that year, Congress enacted Public Law 83-280 to permit states to assert limited civil and broad criminal jurisdiction in Indian country. *See* Act of Aug. 15, 1953, ch. 505, 67 Stat. 588 (Public Law 280) (codified as amended at 18 U.S.C. §1162, 25 U.S.C. §§ 1321-26, 28 U.S.C. §1360 (1982 & Supp. 1985)). Congress included a provision that operated to "give consent of the United States to those States presently having organic laws expressly disclaiming jurisdiction to acquire jurisdiction subseqeunt to enactment by amending or repealing such disclaimer laws." *See* S. Rep. No. 699, 83d Cong., 1st Sess., *reprinted in* 1953 U.S. Code Cong. & Admin. News 2409, 2412; *see also* Public law 280, §6, 67 Stat. at 590 (codified as amended at 25 U.S.C. §1324). The Committee Report listed Oklahoma among the states with such disclaimers, and stated that the "[e]ffect of the disclaimer of jurisdiction over Indian land within the borders of these States–in the absence of consent being given for future action to assume jurisdiction–is to retain exclusive Federal jurisdiction until Indian title in such lands is extinguished." S.Rep. No. 699, 1953 U.S. Code Cong. & Admin. News at 2412; *cf. McClanhan v. Arizona State Tax Comm'n*, 411 U.S. 164, 175 (1973) (Court noted that Congress had acted on the assumption that the states lacked jurisdiction over the Navajos on their reservation). Creek nation title to the Mackey site has never been extinguish.[6]

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[5] We again emphasize that we express no opinion regarding jurisdiction on allotted Creek lands or on other lands located within the 1866 reservation boundaries. We note, for example, that the Tribe does not concede that the State has complete jurisdiction on Creek allotments and individual trust lands. *See* rec., vol. V, at 258-59 (testimony of William Foster). That issue is not before us.

[6] We note that in 1953, Oklahoma officials took the position that Public Law 280 was not necessary for the state because Oklahoma already had full jurisdiction over Indians and their lands. *See* R. Strickland, The Indians in

Finally, the State cites the Act of May 8, 1906, ch. 2348, 34 Stat. 182, which provided for the extension of state civil and criminal laws to Indian allottees at the expiration of the trust period restricting allotted lands. This act, however, was an amendment to the General Allotment Act, which by its terms did not apply to the Five Civilized Tribes. *See* General Allotment Act of 1887, §8, 24 Stat. at 391. The 1906 amendment, also by express language, did not apply to the "Indians in the Indian Territory." 34 Stat. at 183. We reject as without merit the State's attempt to limit the non-applicability of the 1906 amendment to one single provision (reservation of exclusive federal jurisdiction). Neither the 1906 amendment nor its subject matter – individual trust allotments–are relevant to the allocation of federal, tribal, and state jurisdiction over Creek tribal lands.

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[6] (Continued from page A-19)
Oklahoma 76 (1980). In the present case, in addition to its statutory arguments, the State cites broad dicta in *United States v. Hester*, 137 F.2d 145 (10th Cir. 1943), in support of its proposition that Oklahoma has "complete civil and criminal jurisdiction over all citizens residing within the state." Brief of Appellants at 12; *see id.*, at 19. Of course, the present case does not involve, nor does the Tribe challenge, Oklahoma's jurisdiction over its Indian citizens outside of Indian country. Moreover, *Hester* involved the authority of the state to tax a restricted Indian allotment pursuant to a specific act of Congress passed in 1928.

Oklahoma's jurisdictional theory apparently dates back to the early days of statehood. At the time, state officials and non-Indian citizens attacked federal restrictions on the alienability of Indian property by arguing that once the Indians received United States and Oklahoma citizenship, the federal government lost its authority to treat them or their lands differently. *See* A. Debo, And Still the Waters Run 174-75 (1984 reprint) (orig. publi. 1940). That theory was rejected by the Supreme Court in *Tiger*, 221 U.S. at 311-12. The State's 1953 position that Public Law 280 was unnecessary for Oklahoma and the broad conclusion suggested by its reading of *Hester* have been rejected by both federal and state courts. *See, e.g., United States v. Burnett*, 777 F.2d 593 (10th Cir. 1985), *cert. denied*, 106 S.Ct. 1952 (1986); *Ahboah v. Housing Auth. of the Kiowa Tribe*, 660 P.2d 625 (Okla. 1983); *State v. Burnett*, 671 P.2d 1165 (Okla. Crim. App. 1983); *C.M.G. v. Oklahoma*, 594 P.2d 798 (Okla. Crim. App.), *cert. denied*, 444 U.S. 992 (1979); *State v. Littlechief*, 573 P.2d 263 (Okla. Crim. App. 1978).

In sum, for whatever reasons, possibly including doubts about its own authority to dispose of Creek treaty lands absent Creek consent, Congress chose not to abrogate the Creek treaties outright. Instead of repudiating the treaties, Congress sought the voluntary relinquishment of Creek tribal title in order to effect a program of individual allotment, disposal of "surplus" lands, and preparation for statehood. Failing to induce the Creeks by negotiation to give up their tribal lands, Congress sought to force concessions by federally preempting Creek jurisdiction. The Creeks finally agreed to allotment and disposal of tribal lands. Whatever the jurisdictional provisions or implications of federal legislation with regard to the allotted tracts and those distributed to non-Indians, the history and legislation reveal no act by Congress to divest itself or the tribe (except by preemption) of authority over the remaining tribal lands, or to abrogate the treaty promises of immunity from state law on those lands. There is simply no clear evidence that Congress intended to reliquish federal and tribal authoirty prior to extinguishing tribal title or dissolving the tribal government. In *Cabazon*, the Supreme Court noted that "a grant to States of general civil regulatory power over Indian reservations would result in the destruction of tribal institutions and values." 107 S.Ct. 1088. Although Congress at one time may have envisioned the termination of the Creek nation and complete divestiture of its territorial sovereignty, the legislation enacted in 1906 reveals that Congress decided not to implement that goal, and instead explicitly perpetuated the Creek Nation and recognized its continuing legisatlive authority. *See Harjo*, 420 F. Supp. at 1121 n.20 ("Congress did not intend here to divest the [Creek] National Council's power to legislate"). Congress subsequently repudiated its earlier policies of termination and enacted legislation designed to restore governmental powers to the Oklahoma tribes. *See* Oklahoma Indian Welfare Act, ch. 831, 49 Stat. 1967 (1936) (codified as amended at 25 U.S.C. §§501-509 (1982)); Indian Reorganization Act, ch. 576, 48 Stat. 984 (1934) (codified as amended at 25 U.S.C. §§461 *et seq.* (1982)); *see also Seber*, 318 U.S. at 718. It is not for the courts to complete a task that Congress chose not to finish.

We conclude that the series of federal laws enacted prior to statehood and the Oklahoma Enabling act do not divest the federal government of authority over Creek tribal lands, do not abolish the

Creek Nation's legislative and regulatory authority over such lands, and do not evince a clear intent by Congress to permit the State to assert jurisdiction.

B. Balancing of Federal, Tribal, and State Interests

Even though we conclude that Congress did not expressly consent to Oklahoma's assertion of jurisdiction over Creek tribal lands, the Supreme Court has also recognized that "under certain circumstances a State may validly assert authority over the activities of nonmembers on a reservation, and . . . in exceptional circumstances a State may assert jurisdiction over the on-reservation activities of tribal members." *Cabazon*, 107 S.Ct. at 1091 (qutoing *Mescalero Apache*, 462 U.S. at 331-32). In the present case, however, three of the State's arguments have recently been rejected by the Supreme Court under similar circumstances. The State contends that it has regulatory authority over Creek Nation Bingo for the following reasons: (1) bingo is not a traditional tribal activity, (2) the tribe is "marketing an exemption" because the state does not permit high-stakes bingo, and (3) the state's interest outweighs the Tribe's interest because of the potential for organized crime. In *Cabazon*, the Court rejected these same arguments offered by the State of California. *See id.* at 1092-95.

First, with respect to high-stakes bingo not being a traditional tribal acitivity, the Court rejected the application of the principles of *Rice v. Rehner*, 463 U.S. 713 1983), to Indian bingo. *Cabazon*, 107 S.Ct. at 1094. In contrast to the regulation of liquor at issue in *Rice*, current federal policy promotes Indian bingo, and state regulation is preempted even if it is not a traditional tribal activity. Moreover, as the lower court in *Cabazon* concluded, we believe that the State's focus is too narrow. *See Cabazon Band of Mission Indians v. County of Riverside*, 783 F.2d 900, 906 (9th Cir. 1986), *aff'd*, 107 S.Ct. 1083 (1987).

> "The focus in determining whether a tribal tradition exists should instead be on whether the tribe is engaged in a traditional governmental function, not whether it historically engaged in a particular activity. The Tribes in this case are engaged in the traditional governmental function

> of raising revenue. They are thereby exercising their inherent sovereign governmental authority."

Id. In the present case, we also note that at trial the Tribe produced evidence that the Creek Nation in fact historically did regulate gambling. *See* rec., vol. II, at 100 (testimony of Rennard Strickland).

The Court in *Cabazon* rejected the argument that the Tribe was marketing an exemption from state gambling laws, and distiguished *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980), as follows:

> "In [*Colville, id.* at 155], we held that the State could tax cigarettes sold by tribal smokeshops to non-Indians, even though it would eliminate their competitive advantage and substantially reduce revenues used to provide tribal services, because the Tribes had no right 'to market an exemption from state taxation to persons who would normally do their business elsewhere.' We stated that '[i]t is painfully apparent that the value marketed by the smokeshops to persons coming from outside is not generated on the reservations by activities in which the Tribes have a significant interest.' *Ibid.* Here, however, the Tribes are not merely importing a product onto the reservations for immediate resale to non-Indians. They have built modern facilities which provide recreational opportunities and ancillary services to their patrons, who do not simply drive onto the reservations, make purchases and depart, but spend extended periods of time there enjoying the services the Tribes provide. The Tribes have strong incentive to provide comfortable, clean and attractive facilities and well-run games in order to increase attendance at the games . . . . [T]he Cabazon and Morongo Bands are generating value on the reservations through activities in which they have a substantial interest."

Cabazon, 107 S.Ct. at 1093-94

The State's argument that its interest in preventing organized crime justifies imposition of its laws on Creek bingo was also

rejected in *Cabazon*. In this case, as in *Cabazon*, the state does not prohibit all gambling. *See id.* at 1094. The Court recognized that although the potential for attracting organized crime "is surely a legitimate concern, . . . we are unconvinced that it is sufficient to escape the pre-emptive force of federal and tribal interests apparent in this case." *Id.* at 1094; *see also id.* at 1092-93 & nn. 19, 20 & 21 (federal policies supporting tribal self-determination; opposing state regulation of Indian bingo). In addition, as the district court noted, the Creek Nation also has a substantial interest in preventing the infiltration of organized crime. *See* rec., vol. I, doc. 106, at 25 n.19.

C. Tribal Enterprise

The State asserts that Creek Nation Bingo is not a "tribal enterprise," and thus it and its manager ICUSA are not shielded from state regulation. We disagree. The district court found that

> "Creek Nation Bingo is a tribal bingo enterprise owned, governed and controlled by the Muscogee (Creek) Nation. The tribal bingo enterprise was established by the Creek National Council and is controlled and supervised by the Muscogee (Creek) Public Gaming Commissioner. Muscogee Nation Public Gaming Oridinance, NCA-84-04 (March 9, 1984).
>
> "Indian Country U.S.A., Inc., is a South Dakota corporation which serves as the general partner of the limited partnership Indian Country, U.S.A., a Limited Partnership #1. It operates Creek Nation Bingo under a management agreement approved by the National Council, Ordinance NCA-84-07 (March 15, 1984), the Principal Chief and the Bureau of Indian Affairs. Under the agreement, Indian Country U.S.A., Inc., is the agent of the Nation in the day-to-day operations of the bingo enterprise. The agreement also provides that the profits of the enterprise are to be distributed between the tribe and the management company. Even though Indian Country U.S.A., Inc. provided the start-up capital for construction and

> development of the tribal bingo hall, under the agreement it is fully compensated for its management services and its venture capital investment.
>
> "The Court further finds the Creek Nation, with the federal government acting as trustee on behalf of the tribe, owns all of the real property associated with the enterprise, including the Mackey site, and all improvements thereon."

Rec., vol. I, doc. 106, at 12-13 (footnote omitted).

The evidence in the record amply supports the district court conclusion that Creek Nation Bingo is a "tribal enterprise." The Creek Nation retains full ownership rights over the land and facility and ultimate control over the bingo activities. Furthermore, whatever the specific arrangements for daily management control, return of capital, and distribution of profits, it is clear that the Creek Nation developed the bingo enterprise for the benefit of the tribe. It is also clear that benefits are in fact flowing to the tribe, in the form of both profits and employment. *See* rec., vol. IV, at 83 (testimony of Gary Breshears) (tribal bingo profits appropriated to health care); *id.*, vol. VI, at 428 (testimony of Gordon Sjodin) (less then ten percent of Creek Nation bingo employees had a prior job); *id.* at 427 (eighty percent of Creek Nation Bingo employees are Creeks).

The Bureau of Indian Affairs has approved the Creek Nation-ICUSA management contract. Particularly in light of federal policies encouraging tribal bingo enterprises, economic development, and substitution of private sector investment for federal economic assistance, the district court properly declined to give much wieght to the fact that the Creek Nation has engaged non-Indian capital and expertise in developing and operating Creek Nation Bingo. Although this issue was apparently not raised in *Cabazon*, the bingo games there were characterized as "operated by non-Indian professional operators, who receive a percentage of the profits." *Cabazon*, 783 F.2d at 901; *see also Seminole Tribe of Florida v. Butterworth*, 658 F.2d 310, 311 (5th Cir. 1981) (tribe contracted with private limited partnership to build and operate bingo hall on Indian reservation in exchange for percentage of profits as management fees), *cert. denied*, 455 U.S. 1020 (1982). We thus agree with the district court that Creek Nation bingo is a tribal

enterprise and that its immunity from state regulation extends to ICUSA.[7]

IV.
SALES TAX

We next consider whether the State may impose a sales tax on the gross revenues of the tribal bingo enterprise and require the enterprise to collect and remit such a tax. The Supreme Court has recognized that a "State may sometimes impose a nondiscriminatory tax on non-Indian customers of Indian retailers doing business on the reservation." *Colville*, 447 U.S. at 151. In this context of transactions between Indian sellers and nonmember purchasers, the Court has upheld the imposition of state excise and sales taxes on cigarettes and tobacco products that were imported onto the reservation for resale. *See California State Bd. of Equalization v. Chemehuevi Indian Tribe*, 106 S.Ct. 289 (1985); *Colville*, 447 U.S. 134; *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463 (1976); *see also Chemehuevi Indian Tribe v. California State Bd. of Equalization*, 800 F.2d 1446 (9th Cir. 1986), *cert. denied*, 107 S.Ct. 2184 (1987). The case before us presents a different context in which to consider the reach of a state's taxing authority over transactions within Indian country involving tribal retailers. *Cf. Chemehuevi*, 800 F.2d at 1451 n.2.

The district recognized that the state tax statute provides that the legal incidence of the tax falls on the purchaser. *See* rec., vol. I, doc. 106, at 16. The court construed the tax code, however, to also

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[7] The State focuses too narrowly on whether a strict "master-servant" agency relationship exists between the Creek Nation and ICUSA, and suggests that only if ICUSA is such an "agent" can it be afforded immunity from state regulations. We are not persuaded. The preemption of state laws extends to the Creek Nation tribal bingo enterprise as a whole, which includes the involvement of non-Indians. Because we conclude that Creek Nation Bingo is a tribal enterprise, we need not address whether Creek sovereignty, Creek bingo regulations, and federal policies would also preempt state authority to regulate a purely non-Indian bingo enterprise conducted on Creek Nation lands. *Cf. New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983) (comprehensive tribal regulatory scheme preempted state regulation of non-member hunting and fishing on the reservation).

impose the tax directly on a vendor tribe, because once the tax is collected from the consumer, the tribe becomes a "taxpayer" for purposes of enforcement and collection. Upon failure to collect and remit the tax, the vendor becomes personally liable and subject to penalties, interest, and liens on property. The court concluded that "to the extent that its sales tax laws operate to impose liability on the Creek Nation as a taxpayer, the State's authority is pre-empted by federal law." Rec., vol. I, doc. 106, at 14-15. Alternatively, the court held that "to the extent the State's tax . . . [is] directed against activities created, sold and consumed on tribal lands, the State's authority interferes with the tribe's ability to exercise its sovereign functions." *Id.* at 15. Distinguishing the cigarette tax cases, the court concluded that in the present case, the Tribe's interests outweigh those of the State, and thus the tax is impermissible.

The State contends that the district court erred in treating the sales tax as placing direct tax liability on the tribe, arguing that the "legal incidence" of Oklahoma's tax clearly falls on the nonmember purchaser. In addition, the State argues that the tax is not preempted or otherwise impermissible, because the actual burden also falls on the purchaser. According to the State, imposition of the sales tax will not diminish tribal revenues and the collection requirements do not interfere with tribal self-government.

The Tribe contends that the Oklahoma sales tax places a direct tax burden on the Tribe as a "taxpayer" and is thus impermissible because Congress has not expressly given its consent. The Tribe further contends that the tax is preempted because it is imposed on a product created, sold, and consumed entirely upon tribal lands. The Tribe argues that the value of the product is generated on tribal lands, and involves activities in which it has a substantial interest. The Tribe suggests that imposition of the tax interferes with strong federal policies promoting Indian economic development. Thus, according to the Tribe, its strong interest outweighs the State's general interest in raising revenues.

We agree with the district court that the Oklahoma sales tax code, Okla. Stat. tit. 68, §§ 1350-1372 (1981 & Supp. 1986), provides that the legal incidence of the tax falls on the consumer. We do not consider it appropriate, however, to treat the vendor liability provisions either as a direct "tax" or as a burden on the Tribe for purposes of determining the general validly of the sales tax and collection requiements. First, we note that the Washington state

statute upheld in *Colville* also made a vendor personally liable upon failure to properly collect and remit the tax to the state. *See* Wash. Rev. Code §82.08.050 (1976), *cited in Colville*, 447 U.S. at 142. Second, these liability and sanction provisions are effectively triggered by *noncompliance* with the collection and remittance requirements. We do not believe that an otherwise valid tax is invalidated solely because of objectionable or imperissible provisions operating against the vendor that are triggered by teh vendor's noncompliance.[8] Nevertheless, we agree with the district court's conclusion that the state tax is impermissible.

The federal government's exclusive authority over relations with Indian tribes, *see Blackfeet Tribe*, 471 U.S. at 764, and the quasi-sovereign status of tribes

> "have given rise to two independent but related barriers to the assertion of sate regulatory authority over tribal reservations and members. First, the exercise of such authority may be pre-empted by federal law. Second, it may unlawfully infringe 'on the right of reservation Indians to make their own laws and be ruled by them.' [E]ither [barrier], standing alone, can be a sufficient basis for holding state law inapplicable to activity undertaken on the reservation or by tribal members."

White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 142-43 (1980) (citations omitted) (quoting *Williams v. Lee*, 358 U.S. 217, 220 (1959)).

The preemption analysis applies a set of principles unique to Indian cases. *See Bracker*, 448 U.S. at 143-44. Ambuiguities in federal law are construed in favor of the tribe, and preemption does not require an express congressional statement to that effect. *See id.* at 144. In *Cabazon*, the Court noted the general presumption that state laws do not apply within Indian country. *See* 107 S.Ct. at 1092 n.18. That presumption, however, is not as strong in the context of

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[8] Although we reject the district's court's treatment of this issue in the context of this case, we do not imply that these provisions could be enforced against the Creek Nation as vendor. Because we hold that the sales tax is preempted, we need not decide the validity of the vendor delinquency provisions as applied to the Tribe.

the assertion of state authority over non-Indian activity on a reservation. *See id.* Thus, when a state "asserts authority over the conduct of non-Indians engaging in activity on the reservation," *Bracker*, 448 U.S. at 144, the Court has instructed us to engage in "a particularized inquiry into the nature of the state, federal, and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authroity would violate federal law." *Id.* at 145. Such an inquiry focuses on an examination of "the language of the relevant federal treaties an statutes in terms of both the broad policies that underlie them and the notions of sovereignty that have developed from historical traditions of tribal independence." Id. at 144-45. "State jurisdiction is preempted by the operation of federal law if it interferes or is incompatible with federal and tribal interests reflected in federal law, unless the state interests at stake are sufficient to justify the assertion of state authority." *Mescalero Apache Tribe*, 462 U.S. at 334. For the reasons that follow, we conclude that the state's interest in taxing Creek bingo and related activities is minimal, and is compatible with and outweighed by federal and tribal interests.

The treaties between the Creek Nation and the Untied States repeatedly promised to preserve and protect the Creek Nation's right of self-government and territorial immunity from state laws. *See e.g.*, Treaty of 1832, art. 14, 7 Stat. at 368; Treaty of 1856, arts. 4 15, 11 Stat.. at 700, 703-04; Treaty of 1866, arts. 3, 10, 12, 14 Stat. at 786, 788, 790. These express guarantees supplement and reinforce the usual preemption consideration that state laws not interfere with tribal interests and governance. In the present case, tribal and federal interests are particularly strong. The federal government has been heavily involved in promoting and assisting in development of tribal bingo enterprises. *See Cabazon*, 107 S.Ct. at 1092-93. The Creek Nation's management agreement with ICUSA has been specifically approved by the Bureau of Indian Affirs, purusant to 25 U.S.C. §81 (1982). *Cf. Cabazon*, 107 S.Ct. at 1093. The federal government has also adopted a position "strongly oppos[ing]" the imposition of state gambling regulations on Indian bingo. *See id.* at 1092 n.21. Although this policy does not directly address the issue of state taxation, the state's attempt to tax bingo activities adds an additional burden to an enterprise in which the federal government opposes state interference. In *Cabazon*, the Court listed various statutes under which the Secretary of the

Interior had financially assisted the Cabazon and Morongo Bands. *Id.* at 1093. The Creek Nation's reliance on capital investment from the private sector is perhaps even more in accord with current federal policies. *See* Brief of Appellees, at 18-19 (quoting 1983 Statement of President Reagan). Because the Creek Nation has sought to reduce its dependence on federal assistance and has utilized private sector investment in developing this tribal enterprise, we believe that the federal and tribal interests in maximizing tribal profits are particularly strong.

In *Colville*, the Court upheld the impostion of state sales and excise taxes applied to on-resrvation Indian retail sales of cigarettes and tobacco products to nonmembers. *See* 447 U.S. 134. In so doing, the Court emphasized a number of crucial points. First, it was "painfully apparent that the value marketed by the smokeshops to persons coming from outside is not generated on the resrvations by activities in which the Tribes have a significant interest." *Id.* at 155. Second, the Court noted that the taxes were "assessed against nonmembers of the Tribes and concern transactions in personalty with no substantital connection to the reservation lands." *Id.* at 156. The state tax was directed at cigarette and tobacco products that were simply imported onto the reservations for resale, and the underlying "product" of value was the claimed exemption itself, attracting customers who would normally do their business elsewhere.

This case is markedly different. Here, the "product" is a form of entertainment that is wholly created, sold, and consumed within the boundaries of Creek Nation lands. Patrons do not travel onto Creek lands to play bingo in order to avoid sales taxes. The Tribe does not "market an exemption from state taxation to persons who would normally do their business elsewhere," *Colville*, 447 U.S. at 155, because high-stakes bingo is not generally available within the state. Thus, Creek Nation Bingo does not undermine the state economy or tax base. The state is not losing tax revenues it would otherwise obtain from sales made outside of tribal boundaries., In fact, at trial the Tribe introduced evidence that the overall economic effect of Creek Nation Bingo on the state and local economy is positive. In contrast to the taxes in *Colville* and related cigarette cases, the state tax as applied to Creek Nation Bingo is directed solely at on-reservation value. *Cf. id.* at 157 (state interest strongest when tax directed at off-reservation value). The product of value is not a tax

exemption, but the bingo games themselves, an activity with a substantial connection to the Creek Nation's lands. The Tribe has a very substantial interest in providing well-run entertainment to patrons and in furnishing "comfortable, clean and attractive facilities." *Cabazon*, 107 S.Ct. at 1094. The imposition of a sales tax would burden the tribal enterprise by increasing the total cost of playing bingo and by imposing collection, remittance, and recordkeeping requirements. Although these burdens alone might not serve to displace the tax,[9] we believe they are relevant when , as here, the state's own interest in taxing the on-reservation transaction is minimal.

The State has a general interest in raising revenue. That interest alone, however, is insufficient to justify taxing this tribal activity. *See Mescalero Apache Tribe*, 462 U.S. at 343. The State's interest is particularly minimal when it seeks to raise revenue by taking advantage of activities that are wholly created and consumed within

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9 In a series of cases involving non-Indian *sellers* and tribal *purchasers*, the Supreme Court has held that the state tax levied upon the non-Indian party was nevertheless preempted because of the extensive federal involvement in the tribal activity and the fact that the economic burden of the tax was passed through to the tribe. *See generally Ramah Navajo School Bd., Inc. v. Bureau of Revenue*, 458 U.S. 832 (1982); *Central Machinery Co. v. Arizona State Tax Comm'n*, 448 U.S. 160 (1980); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980). In the present case, the economic impact on the Tribe of adding the state sales tax onto the price of bingo games is perhaps more difficult to measure. That may often be the case, however, when a tribal enterprise acts as seller to non-member purchasers. In *Colville*, the state tax had a clearly adverse impact on the tribe because the tribe sought to generate revenues by imposing its own sales tax on private Indian retailers. Nevertheless, because the product was imported onto the reservation and the tribe did not have a substantial interest in the cigarette "smokeshops," the Court upheld the state tax. When tribes develop their own tribally-owned enterprises, however, and create a product on the reservation, there is no need or incentive to impose a separate tribal tax because tribal revenues are generated in the form of profits from sales. Thus, the greater the tribal interests and involvement, the less chance for a direct conflict between state and tribal taxes, as in *Colville*. Because we do not read the Supreme Court cases as reversing the traditional presumption against state authority in Indian country and creating a per se rule permitting state sales taxes on the on-reservation transactions between Indian retailers and nonmember purchasers, we conclude that our preemption analysis cannot turn on the severity of a direct economic burden on tribal revenues caused by the state tax.

tribal lands and over which it has no control. *See Central Machinery Co. v. Arizona State Tax Comm'n*, 448 U.S. 160, 174 (1980) (separate opinion of Justice Powell).

The State also has a general interest in taxing its residents, for whom it provides services. Nevertheless, this interest is substantially diminished when the residents engage in activities largely beyond the state's jurisdiction and control, unless the activity or circumstances somehow undermine the state's ability to protect its economy and tax base. As already discussed, this is not the case with respect to Creek Nation Bingo. Moreover, the State pointed to no services that it provides on Creek Nation lands that would justify the tax. *Cf. Chemehuevi*, 800 F.2d at 1449 (state provided substantial services on the reservation). In sum, although the state has a general interest in taxing its residents, we agree with the trial court that its interest is outweighed in this case by federal and tribal interests, and by the nature of the activity sought to be taxed.

We conclude that under the circumstances of this case, the application of Oklahoma's sales tax "is incompatible with federal and tribal interests reflected in federal law," *Mescalero Apache Tribe*, 462 U.S. at 334, and that the state interests at stake are not "sufficient to justify the assertion of state authority," *id.* The federal and tribal interests are particularly strong, and the treaties with the Creek Nation as well as traditional presumptions favor the exclusion of state law from Creek Nation lands. Most important, the product is created, sold, and consumed wholly within tribal boundaries, significantly reducing the state's interest. We therefore affirm the district court's decision holding the tax invalid.

V.
DISMISSAL OF ICUSA

The district court concluded that ICUSA was barred from seeking to enjoin enforcement of the state tax laws against Creek Nation Bingo. We agree that the Tax Injunction Act, 28 U.S.C. § 1341 (1982), precludes ICUSA's claim against the Tax Commission. We also agree with the court that the dismissal of this claim will not affect the scope of relief, because all of the substantive issues can be reached by deciding the Tribe's claim challenging state taxation. *Cf. Moe*, 425 U.S. at 475 n.14.

We reverse, however, the district court's complete dismissal of ICUSA as a party. The Tax Injunction Act does not apply to ICUSA's action against the Tulsa County District Attorney to enjoin inforcement of the substantive state bingo regulations with respect to ICUSA's management of Creek Nation Bingo. Nor does the Eleventh Amendment bar ICUSA's suit against the District Attorney, because the claim alleges the violation of federal law and seeks only to enjoin the District Attorney's future conduct. *See Edwards v. Valdez*, 789 F.2d 1477, 1480-81 (10th Cir. 1986).

VI.
CONCLUSION

We affirm the district court's judgment that the State's substantive bingo regulations and sales tax laws are preempted with respect to Creek Nation Bingo because they impermissibly interfere with tribal jurisdiction and federal laws and policies. We also affirm the dismissal of ICUSA's suit against the Oklahoma Tax Commission, but reverse the dismissal of ICUSA as a party. We reject as without merit or as unnecessary to the resolution of this suit any arguments raised by the parties that we have not discussed.

Affirmed in part and reversed in part.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

INDIAN COUNTRY, U.S.A., INC. a South Dakota Corporation, and THE MUSCOGEE (CREEK) NATION, a Federally Recognized Indian Tribe, Plaintiffs,	)	
vs.	)	No. 85-C-643-E
THE STATE OF OKLAHOMA *ex rel.* the Oklahoma Tax Commission, and the District Attorney for Tulsa County, Defendants.	)	
and		
THE STATE OF OKLAHOMA *ex rel.* DAVID MOSS, District Attorney, Respondent [Plaintiff],	)	
vs.	)	No. 85-C-658-E
THE MUSCOGEE (CREEK) NATION, a Federally Recognized Indian Tribe, Petitioner [Defendant].	)	

MEMORANDUM OPINION AND ORDER

The court has before it for consideration an action for declaratory and injunctive relief against the State of Oklahoma *ex*

rel. the Oklahoma Tax Commission, and the State of Oklahoma *ex rel.* the District Attorney for Tulsa County. Plaintiffs Indian Country U.S.A., Inc. and the Muscogee (Creek) Nation request this court enter an order declaring Oklahoma's Sales Tax Code and bingo regulations inapplicable to the tribal bingo enterprise known as "Creek Nation Bingo" and enjoining the District Attorney, the Tax Commission, and the individual commissioners from enforcing these laws against the plaintiffs.

The issues were tried to the court from December 9 to December 13, 1985, and the court, after considering the testimony and exhibits presented and the briefs and arguments of the parties, announced its decision from the bench on December 20, 1985. The court now enters the following order in further support of that decision.

STATUS OF THE MUSCOGEE (CREEK) NATION

The Muscogee (Creek) Nation is a federally recognized Indian tribe currently operating under a new constitution adopted in 1979 and approved by the Bureau of Indian Affairs of the United States Department of Interior.[1]

[1] The testimony of Rennard Strickland and Woodrow Haney laid the foundation for many of the historical facts underlying this section of the opinion. Dr. Strickland is presently Dean of the Southern Illinois University Law School and has formerly served as the acting Dean of the University of Tulsa School of Law and as the holder of an endowed Chair in the Combined Disciplines of Law and History at the University of Tulsa. Dr. Strickland is the author of many books and articles on the history of the Five Civilized Tribes and Editor-in-Chief of the 1982 revised edition of *Felix S. Cohen's Handbook of Federal Indian Law*. The 1982 revision of *Cohen* was mandated by an act of Congress and is widely recognized as the authoritative treatise on Indian Law.

Mr. Haney speaks fluent Creek (a Muscogee tongue) and served for many years as an advisor to the Chiefs of the Creek Nation and as a member of the Creek National Council before the adoption of the new Creek Constitution in 1979. Mr. Haney is an internationally recognized artist, craftsman and lecturer on the history and customs of the Creek people.

For a more thorough review of Creek history, the court refers readers to the historical treatment afforded the Creeks by author Angie Debo in her many books, particularly *And Still the Waters Run* (1972), and *The Creeks: The Road to Disappearance* (1967). Both of these books were relied on by the court in *Harjo v. Kleppe*, 420 F. Supp. 1110 (D.D.C. 1976), *aff'd sub nom., Harjo v. Andrews*, 581 F.2d 949 (D.C. Cir. 1978). That court's comprehensive treatment of the history of the Creek nation is adopted by this court.

The government-to-government relationship between the Creeks and the federal government began with the Treaty of 1790,[2] was continued by the Treaty of 1866[3] and continues to the present.

During the 1820's the federal government adopted a policy of forcible removal of the Creeks from their homelands in the southeastern United States to what is presently the State of Oklahoma. *Harjo v. Kleppe*, 420 F. Supp. 1110, 1119 (D.D.C. 1976) (discussing the Indian Removal Act, Act of May 28, 1830, ch. 148, 4 Stat. 411, and Treaty with the Creeks, March 24, 1832, 7 Stat. 366). By the terms of the Removal Treaty of 1832, the Creeks gave up their eastern land holdings for new lands in Indian Territory. The federal government promised these new lands would be subject to the sovereign jurisdiction and control of the Creeks.

The political, cultural and economic institutions of the Creeks were rebuilt in Indian Territory. Because of their cultural and political sophistication, the Creeks and four other Indian tribes who had been removed to Oklahoma through the Removal Act of 1830, became know as the Five Civilized Tribes. *Harjo*, 420 F. Supp. at 1119. The Five Tribes owned all of the present State of Oklahoma except the panhandle region. *Id.*

During the American Civil War, some members of the Five Tribes became allied with the Confederacy. As a result of this involvement, the Creeks were forced to cede the western half of their land to the federal government by the Treaty of 1866. By the terms of that treaty, the eastern half of the Creek lands were retained as a home for the Creek Nation[4] and continued to be known as the Indian Terriotry. 14 Stat. 785, 786, 788; *Harjo*, 420 F. Supp. at 1119. The Creeks agreed to such legislation ss was deemed necessary by the federal government for the protection of the rights of persons and property within the Indian Territory, provided that such "legislation shall not in any manner interfere with or annul their present tribal organization, rights, laws, privileges, and customs." Article X, 14 Stat. 785, 788.

Although the treaty was "highly disadvantageous to the Creeks," the Creek Nation prospered during the last third of the nineteenth century. *Harjo*, 420 F. Supp. at 1120. in 1867 the Creeks adjopted a constitution and code of laws for the "Muscogee Nation." *Id.* That constitution, patterned after American federalism, provided for executive, legislative and judical branches of government. Legislative power was placed in a National Council, an elected bicameral body. During this period, in accord with ancient Indian

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[2] Treaty with the Creeks, August 7, 1790, 7 Stat. 35.

[3] Treaty with the Creeks, June 14, 1866, 14 Stat. 785.

custom, all land was held by the tribe communally. Members of the tribe could work as much of the land as they wanted; when the land ceased to be worked, it reverted to the Nation. *Id.*

Throughout this same period, however, large numbers of white settlers were illegally living in Indian Territory. Renewed efforts toward forced allotment of Indian lands reached a peak by the 1890's. Under increasing pressure from white settlers and proponents of allotment and assimilation, in 1887 Congress passed the Dawes Severalty Act, ch. 119, 24 Stat. 388. The Dawes Act provided for allotments of Indian reservations; the remaining unallotted lands were to be purchased by the federal government and made available for homesteading. *Harjo,* 420 F. Supp. at 1121-22.

Although the Five Civilized Tribes were exempt from the Act, in 1893 Congress created a commission, later known as the Dawes Commission, to negotiate with the Five Tribes. Act of March 3, 1893, ch. 209, 27 Stat. 612, 645-46. Those negotiations concerned allotment of the Five Tribes' lands among their members and disposal of any land remaining after allotment and addressed further adjustments necessary to the dissolution of these tribes. 27 Stat. 645. For the next two years, the Dawes Commission attempted to negotiate the disssolution of the Five Tribes. *Harjo,* 420 F. Supp. at 1122. It had minimal success; by 1895 the Five Tribes still refused to deal with the Commission. Consequently, Congress authorized the survey of all Indian land, and in 1896 directed the Commission to make a complete roll of the members of the Five Tribes. *Id.*

Additionally, bills were introduced in Congress calling for the forced abolition of tribal status. *Id.* Congress reacted by subjecting to presidential veto all laws passed by the National Council except resolutions of adjournment and acts relating to negotiations with the Dawes Commission. Act of June 7, 1897, ch. 3, 30 Stat. 62, 84. Succumbing to these pressures, the Five Tribes began to deal with the Commission. *Harjo,* 420 F. Supp. at 1122.

At a result of thise dealings, by 1898 agreements were made by four of the tribes with the Commission; however, it appeared that three of the agreements, including the Creek agreement, would not be ratified by the tribal members. *Id.* Consequently, on June 28, 1898, Congress enacted the Curtis Act,[6] which provided for forced

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[6] Act of June 28, 1898, ch. 517, 30 Stat. 495

allotments and the eventual termination of the tribal tenure without the Indians' consent if the agreements were not ratified. The Creeks rejected their agreement with the Commission and the Act went into effect in their country. *Id.* The pressures applied by the federal government through the Act continued to escalate, however, and in 1901 the Creeks eventually consented to a new agreement that provided for the allotment of their lands to individual Creeks.[7] The agreement recognized that until such time as it was in fact dissolved, the Creek government would continue to function under the 1867 constitution as modified by the 1901 Act and prior agreements. *Harjo*, 420 F. Supp. at 1124.

When it became clear that the affairs of the Five Tribes could not be wound up by the date set for their final dissolution, the Congress, in early 1906, debated and enacted the Five Tribes Act. Act of April 26, 1906, ch. 1876, 34 Stat. 137. During the debate on the bill, Congress found it would be unable to complete legislative action before the date set for dissolution. *Harjo*, 420 F. Supp. at 1128. As a result, Congress passed a joint resolution that extended the life of the Five Tribes until the allottment process had been completed, or until otherwise provided by Congress. Shortly after this resolution, the Act became law. Section 28 of that Act superceded the joint resolution and provided "[t]hat the tribal existence and present tribal governments of the Choctaw, Chickasaw, Cherokee, Creek, and Seminole tribes or nations are . . . continued in full force and effect for all purposes authorized by law . . . . " 34 Stat. 137, 148. By this provision, "Congress had declined to terminate the tribal existence or dissolve the tribal governments, despite all of its earlier intentions to do so." *Harjo*, 420 F. Supp. at 1129. *See also Board of County Commissioners v. Seber*, 318 U.S. 705, 718, 63 S.Ct. 920, 927 (1943) (holding that the Creek Nation still exists and the guardianship relationship between the Creek Nation and the federal government continues until expressly terminated by Congress).

The tribal government of the Creek Nation was never disestablished. As stated by the Court in *Harjo:*

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[7] Act of March 1, 1901, ch. 676, 31 Stat. 861

> [D]espite the general intentions of the Congress of the late nineteenth and early twentieth centuries to ultimately terminate the tribal government of the Creeks, and despite an elaborate statutory scheme implementing numerous intermediate steps toward that end, the final dissolution of the Creek tribal government created by the Creek Constitution of 1867 was never statutorily accomplished, and indeed that government was instead explicitly perpetuated.

420 F. Supp. at 1118.

THE MACKEY SITE

This court must first determine whether the Mackey site, [8] the land upon which the tribal bingo enterprise is located, is Indian Country. Indian Country is defined in part to mean "all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and including rights-of-way running through the reservation . . ." 18 U.S.C. §1151(a). The State contends that the Mackey site is not Indian Country because it was land allotted to a freedman and is not a part of a reservation under the juridiction of the federal government.

The Mackey site is a portion of the original land that was acquired by the tribe as partial compensation for the loss of tribal property east of the Mississippi River and for removal to the area

[8] The land is described as follows:

> Beginning at the NW corner of Lot 1 of Section 18, Township 18 North, Range 13 East; thence in a generally southeasterly dirction with the so-called meander line forming the West boundary of Lots 1, 5 and 6 to its intersection with the section line between Sections 17 and 18; thence West to the thread of the stream of the Arkansas River; thence up said river with the thread of the stream to a point where it intersects the section line between Sections 18 and 7; thence East to point of beginning, containing 100 acres, more or less, Tulsa County, Oklahoma.

now known as the State of Oklahoma. As previously discussed, by the Treaty of 1866, the Creek Nation ceded the western half of its domain to the United States. That treaty, however, expressly provided that the eastern half of the Creek lands was retained by the Creeks as a home for the Creek Nation. The Mackey site is a part of those retained lands.

The Treaty of 1866 was the last diminishment of the territorial boundaries of the lands of the Creek Nation; since that time no further treaties have been entered into between the federal government and the Creek Nation. *See Harjo*, 420 F. Supp. at 1120. Although there have been acts of Congress agreed to by the Creeks subsequent to 1866, none of these acts has diminished the Creek homelands.

In legal effect, the Mackey site has never been allotted. In 1925, title to the Mackey site was quieted in the Muscogee (Creek) Nation by final decree of the United States District Court for the Eastern District of Oklahoma. That court found that the Creek Nation acquired title to the subject tract of land as a part of its reservation by virtue of the Treaty of 1833, 14 Stat. 417, 419, as confirmed by patent from the United States dated August 11, 1852, and that title to the land is subject to sale or lease only for the benefit of the Creek Nation. The court further found the intervenor State of Oklahoma and defendant heirs and assigns of freedam Louisa Mackey had no right, title or interest in that land.

This court finds the Mackey site is Indian Country. Even though the lands of the Five Civilized Tribes were not always called reservations, whether lands are determined to be Indian Country does not turn on the label used in designating them. *Cf. United States v. McGowan*, 302 U.S. 535, 538, 58 S.Ct. 286, 287-89 (1938) (specifically concerned with "reservations" and "colonies"). Indian Country includes "any unceded lands owned or acquired by an Indian nation . . ." *United States v. Chavez*, 290 U.S. 357, 364, 54 S.Ct. 217, 220 (1933). To qualify as Indian Country, the land must be appropriated or set apart for the use of the Indians. *See Minnesota v. Hitchcock*, 185 U.S. 373, 390, 22 S.Ct. 650, 657 (1902). *See also* Treaty of 1833, Articles I and II, 14 Stat. 418, 419.

Diminishment of Indian lands must not be lightly inferred; a clear intent on the part of Congress to change the boundaries of the reservation must be present. *Solem v. Bartlett*, 465 U.S. 463, 470,

104 S.Ct. 1161, 1166 (1984); *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 586, 97 S.Ct. 1361, 1363 (1977). "Once a block of land is set aside for an Indian reservation . . . no matter what happens to the title of individual plots within the area, the entire block retains its reservation status until Congress explicity indicates otherwise." *Solem*, 465 U.S. at 470, 104 S.Ct. at 1166.[9]

The Mackey site was a part of the original Creek estate derived by treaty and patent from the United States government. It remained a part of that estate after the Traty of 1866. The Mackey site was not part of the Creek lands allotted to the tribe's members by the terms of the Five Tribes Act, 34 Stat. 137. The court recognizes that the Five Tribes Act contemplated the dissolution of the Creek Nation and specifically provided that lands held by the tribe at the time of dissolution would be held in trust by the United States government. Sections 27, 34 Stat. 137, 148. Yet, the federal government has treated the Mackey site as trust property even though the tribe was never dissolved as contemplated by the Act. The Mackey site is the purest form of Indian Country; it is land set apart for the use and benefit of the Creek Nation. This trust land is Indian Country under §1151(a).

CREEK NATION BINGO

In essence, the State contends that Creek Nation Bingo, the bingo enterprise it seeks to tax and regulate, is not a tribal enterprise but rather a business owned and operated by Indian Country U.S.A., Inc. This court disagrees with that contention.

This court finds Creek Nation Bingo is a tribal bingo enterprise owned, governed and controlled by the Muscogee (Creek) Nation. The tribal bingo enterprise was established by the Creek National Council and is controlled and supervised by the Muscogee (Creek) Public Gaming Commissioner. Muscogee Nation Public Gaming Ordinance, NCA-84-04 (March 9, 1984).

Indian Country, U.S.A., Inc., is a South Dakota corporation which serves as the general partner of the limited partnership Indian

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9 Whether there was ever an attempted allotment of the subject land is not significant, because the decree issued by the eastern district quieted title in the Creek Nation. That sixty-year-old decree is *res judicata* as to the Creek Nation's title to the land as against the State of Oklahoma.

Country, U.S.A., a limited Partnership #1. It operates Creek Nation Bingo under a management agreement approved by the National Council, Ordinance NCA-84-07 (March 15, 1984), the Principal Chief and the Bureau of Indian Affairs. Under the agreement, Indian Country U.S.A., Inc., is the agent of the Nation in the day-to-day operations of the bingo enterprise. The agreement also provides that the profits of the enterprise are to be distributed between the tribe and the management company. Even though Indian Country U.S.A., Inc., provided the start-up capital for the construction and development of the tribal bingo hall, under the agreement it is fully compensated for its management services and its venture capital investment.[10]

The court further finds the Creek Nation, with the federal government acting as trustee on behalf of the tribe, owns all of the real property associated with the enterprise, including the Mackey site, and all improvements thereon.

STATE EXERCISE OF JURISDICTION

The State seeks to assert its authority over the activities taking place on the Creek Nation's land through the following two means: (1) it seeks to apply its sales and use tax laws against Creek Nation Bingo and Indian Country U.S.A., Inc.; and (2) it seeks to regulate the tribal bingo enterprise pursuant to the state's bingo laws. There have been innumerable decisions dealing with the relationship between Indian tribes and state governments. While no simple solutions emerge that resolve the validity of the particular state jurisdiction attempted here, this court finds the State may not apply its sales and use tax laws against the Creek Nation or its tribal enterprise, nor may it regulate the bingo activities taking on Creek lands.

Although at one time this nation adopted a policy that left

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[10] The agreement provides for the following distribution of net proceeds: (1) 40% to Indian Country, U.S.A., Inc. as its return on its capital investment; (2) of the remaining 60%, 40% to Indian Country, U.S.A., Inc., and 60% to the Creek Nation. The agreement further provides, however, that after Indian Country, U.S.A., Inc. recovers its capital investment, the Creek Nation is to receive 60% of the net profits and Indian Country, U.S.A., Inc., is to recieve 40% of those profits.

Indians free from state jurisdiction, *see Rice v. Olson*, 324 U.S. 786, 789, 65 S.Ct. 989, 991 (1945); *Worchester v. Georgia*, 31 U.S. (6 Pet.) 350 (1832), the Supreme Court no longer holds that state laws can have no force within Indian Country. However, while the Court has turned away from the exclusivity of tribal sovereignty, it still recognizes that Indian tribes retain "attributes of sovereignty over both their members and their territory." *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142, 100 S.Ct. 2578, 2583 (1980). Discussing the principles to be applied in determining the permissible boundaries of state jurisdiction, the Court said:

> [T]here is no rigid rule by which to resolve the question whether a particular state law may be applied to an Indian reservation or to tribal members. . . .
>
> Congress has broad power to regulate tribal affairs under the Indian Commerce Clause . . . This congressional authority and the "semi-independent position" of Indian tribes have given rise to two independent but related barriers to the assertion of state regulatory authority over tribal reservations and members. First, the exercise of such authority may be pre-empted by federal law. . . Second, it may unlawfully infringe "on the right of reservation Indians to make their own laws and be ruled by them." . . . The two barriers are independent because either, standing alone, can be a sufficient basis for holding state law inapplicable to activity undertaken on the reservation or by tribal members. They are related, however, in two important ways. The right of tribal self-government is ultimately dependent on and subject to the broad power of Congress. Even so, traditional notions of Indian self-government are so deeply engrained in our jurisprudence that they have provided an important "backdrop" . . . against which vague or ambiguous federal enactments must always be measured.

Id. at 142-43, 100 S.Ct. at 2583 (citations omitted).

When the applicable treaties and federal statutes are read against this backdrop of Indian self-government and sovereignty, it is clear Oklahoma has exceeded its lawful authority. The State's exercise of jurisdiction is impermissible for the following reasons: (1) to the extent its sales tax laws operate to impose liability on the Creek Nation as a taxpayer, the State's authority is pre-empted by federal law; and (2) to the extent the State's tax and regulatory laws are directed against activities created, sold and consumed on tribal lands, the State's authority interferes with the tribe's ability to exercise its sovereign functions. *Ramah Navejo School Bd., Inc. v. Bureau of Revenue of New Mexico,* 458 U.S. 832, 837, 102 S.Ct. 3394, 3398 (1982)

A. Pre-Emption:

The answer to the question of whether federal law pre-empts the State's exercise of authority over the Creek Nation is not controlled by standards of pre-emption developed in other areas.

> Instead, the traditional notions of tribal sovereignty, and the recognition and encouragement of this sovereignty in congressional Acts promoting tribal independence and economic development, inform the pre-emption analysis that governs this inquiry . . . Relevant federal statutes and treaties must be examined in light of "the broad policies that underlie them and the notions of sovereignty that have developed from historical traditions of tribal independence." . . . As a result, ambiguities in federal law should be construed generously, and federal pre-emption is not limited to those situations where Congess has explicitly announced an intention to pre-empt state activity.

Ramah, 458 U.S. at 838, 102 S.Ct. at 3398-99. Thus this court must examine the nature of the attempted state authority over the Creek Nation and the burden it places on the tribe, and determine whether that authority has been pre-empted by federal law.

Through specific statutory provision, the incidence of

Oklahoma's sales tax is on the consumer of the sale of tangible personal property and services. Oklahoma Sales Tax Code, Okla. Stat. tit. 68, §1351 (1981).[11]However, other provisions of the Code clearly impose tax liability on persons other than the consumer.

The definitional section of the Code is set out in §1352 (Supp.1985). Subsection (0) defines a taxpayer as "any person liable to pay a tax imposed by this article." Subsection (Q) defines a tax remitter as: "any person required to collect, report, or remit the tax imposed by this article. A tax remitter who fails, for any reason, to collect, report, or remit said tax shall be considered a taxpayer for purposes of assessment, collection, and enforcement of the tax imposed by this article." Subsction (R) defines a vendor to mean:

> (1) Any person making sales of tangible personal property or services in this state, the gross receipts or gross proceeds from which are taxed by this article; or
>
> (2) Any person maintaining a place of business in this state and making sales of tangible personal property or services, whether at the place of business or elsewhere, to persons within this state, the gross receipts or gross proceeds from which are taxed by this article; . . .

Maintaining a place of business is defined to include "having or maintaining in this state . . . [a] physical place of business . . ." §1352(G). The Code sets out specific obligations of vendors for collecting, reporting and remitting sales taxes and penalties for failure to execute those obligations. *See* tit. 68, §§ 1361, 1362 and 1365 (Supp. 1985). Further, §1369 provides for the collection of deliquent taxes:

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[11] The court agrees with the State's assertion that bingo activities are taxable sales under the Code.

(A) All taxes levied in this article which are delinquent together with any penalty and interest thereon may be collected in the same manner as any other taxes imposed by law in addition to any remedies or penalties set out in this article.

(B) All delinquent taxes levied in this article or penalties or interest shall at all times constitute a lien upon the property of any person liable for the payment thereof, which shall be prior, superior and paramount as against the claims of unsecured creditors.

As previously determined, Creek Nation Bingo is a tribal enterprise of the Creek Nation, managed by its agent Indian Country, U.S.A., Inc. The Creek Nation retained and engaged Indian Country, U.S.A., Inc., to manage the day-to-day operations of the tribal bingo enterprise, but both share in the net profits of that enterprise.

That the Creek Nation is not physically involved in the day-to-day sales is not determinative of its potential tax liability under the Code.[12] It is involved through its agent-vendor, Indian Country, U.S.A., Inc.; it makes "sales of tangible personal property or services" through that agent. There is nothing in the Code that exempts a principal from the tax liability of its agent and there is no assurance that the State would not proceed against the Creek Nation to collect taxes, delinquent or otherwise, if the agent would not or could not satisfy that tax liabililty.

The State recognizes that it could not impose a sales tax on sales made to Indian members on Indian lands. *See generally Bryan v. Itasca County, Minnesota*, 426 U.S. 373, 376-77, 96 S.Ct. 2102, 2105 (1976). It argues, however, that the sales tax involved here is directed against sales to non-Indian purchasers; that the vendor simply collects the tax and passes it on to the State. Yet the Code makes clear that the vendor is a taxpayer and is personally liable for taxes due.

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[12] Of course, this is not to say the Creek Nation is physically absent from the Creek Nation Bingo hall. Its Public Gaming Commissioner and his staff have the right at all times to complete overview of the bingo operations.

Thus, while the Creek Nation is not the taxpayer when the sale is made, it is the taxpayer therafter.[13]

This is distiguishable from the so-called cigarette sales tax cases for at least two reasons. First, unlike this case, the taxes in those cases were directed at the sale of items brought onto the Indian land and consumed off that land after pruchase. *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 155, 100 S.Ct. 2069, 2082 (1980); *Moe v. Salish & Kootenai Tribes of the Flathead Reservation*, 425 U.S. 463, 96 S.Ct. 1634 (1976). Here the item purchased is produced, provided and consumed on land belonging to the Creek Nation. Second, and perhaps more significantly, nothing inthose cases indicates the tribes were treated as taxpayers and subjected to tax liability as is the Creek Nation under the Oklahoma Code. Such status and tax liability is hardly comparable to the "minimal burdens" placed upon the Indian retailers in *Moe*,

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13 *Cf. Ramah*, 458 U.S. at 844 & n. 8, 102 S.Ct. at 3401 & n. 8. In discussing the state's interest in imposing a gross receipts tax on a non-Indian construction company who contracted with a tribal organization to build a school on tribal lands, the Court said:

> The Bureau of Revenue invites us to adopt the "legal incidence" test, under which the legal incidence and not the actual burden of the tax would control the pre-emption inquiry. Of course, in some contexts, the fact that the legal incidence of the tax falls on a non-Indian is significant. See *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S.134, 150-151, 100 S.Ct. 2069, 2079-2080, 65 L. Ed. 2d 10 (1980); *Moe v. Salish & Kootenai Tribes*, 425 U.S. 463, 96 S.Ct. 1634, 48 L. Ed. 2d 96 (1976). However, in *White Mountain*, 448 U.S. at 151, 100 S.Ct. at 2587, we found it significant that the economic burden of the asserted taxes would ultimately fall on the Tribe, even though the legal incidence of the tax was on the non-Indian logging company. Given the comprehensive federal regulatory scheme at issue here, we decline to allow the State to impose additional burdens on the significant federal interest in fostering Indian-run educational institutions, even if those burdens are imposed indirectly through a tax on a non-Indian contractor for work done on the reservation.

425 U.S. at 483, 96 S.Ct. at 1646, and *Washington*, 447 U.S. at 151, 100 S.Ct. at 2080.[14]

This court also finds the reasoning in *McClanahan v. State Tax Commission of Arizona*, 411 U.S. 164, 93 S.Ct. 1257 (1973), persuasive that the State cannot impose the liability sought against the Creek Nation absent the express consent of Congress. There the Court was principally concerned with an attempted imposition of state income tax on individual income earned wholly from reservation sources. In finding Arizona could not tax such income, the Court discussed several federal statutes which, when applied to the situation here, compel the conclusion that Oklahoma has acted beyond its jurisdiction. *Id.* at 176-79, 93 S.Ct. at 1264-66.

As is true of Arizona, Oklahoma was not one of the states that was originally delegated civil and criminal jurisdiction over Indian Country through what is known as Public Law 83-280. Act of August 15, 1953, ch. 505, 67 Stat. 588 (18 U.S.C. §162, 28 U.S.C. §1360). The original Act, however, provided a means whereby other states could have assumed such jurisidiction without the consent of Congress. 67 Stat. 590. Oklahoma never asserted such jurisidiction. *State of Oklahoma ex rel. May v. Seneca Cayuga*

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[14] Another issue in *Washington* was whether the state could seize unstamped cigarettes as contraband if the tribes did not cooperate with the tax collection requirements. 447 U.S. at 161, 100 S.Ct. at 2085. In fact, cigarettes were seized before they reached the reservation. The court found those seizures to be a valid means for the state to enforce its tax provisions.

While it expressly decline to decide whether the state could have entered the reservation, seized the contraband and sold the cigarettes to pay the taxes due, *id.* at 162, 100 S.Ct. at 2086, the Court said:

> It is significant that these seizures take place outside the reservation, in locations where state power over Indian affairs is considerably more expansive than it is within reservation boundaries. *Cf. Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 93 S.Ct. 1267, 36 L. Ed. 2d 114 (1973). By seizing cigarettes en route to the reservation, the State polices against wholesale evasion of its own valid taxes without unnecessarily intruding on core tribal interests.

Id. at 162, 100 S.Ct. at 2085. The collection provisions of the Oklahoma Code are "considerably different" because "[a]ll delinquent taxes levied in this article or penalties or interest shall at all times constitute a lien upon the property of any person liable for payment thereof.." Okla. Stat. tit. 68, §1369. Here, such property, real or personal, is located within Creek land.

Tribe of Oklahoma, 56 O.B.J. 1554, 1557 (July 2, 1985). In 1968, however, Congress changed the procedure for the assertion of such jurisidiction by requiring both the consent of the tribes involved and the amendment of the state's constitution or statutes to reflect the assertion of jurisidiction. 25 U.S.C. §§1322(a), 1324. No state governmental act toward such assumption of jurisdiction has been identified here, nor has the Creek Nation consented to the excercise of such jurisdiction.

Nor does the State show where, under the theory of pre-existing jurisidiction, it has the authority to impose tax liability upon the Creek Nation or to put liens upon its property to satisfy its tax debt. The State argues that neither the Oklahoma Enabling Act[15] nor its constitution,[16] disclaimed the state's governmental interests in Indian lands or property located in what was known as Oklahoma and Indian Territory. It claims that the federal government retained undiminished, not exclusive jurisidiction over Indian property. Relying on *Organized Village of Kake v. Egan*, 36 U.S. 60, 82 S.Ct. 502 (1962), and *Draper v. United States*, 164 U.S. 240, 17 S.Ct. 107 (1896), the State concludes that had Congress intended to exempt the Indians from the general application of state civil and taxing law, it would have expressd that intent in the Enabling Act; that Congress did not express such an intent indicates a contrary intent.

The court agrees with the State's premise that the Enabling Act neither abolished state power entirely nor reserved exclusive federal jurisidiction. *Egan*, 369 U.S. at 70-75, 82 S.Ct. at 568-71 (Court specifically concerned with whether Alaska Statehood Act provided for exlcusive federal jurisdiction over fishing rights of non-reservation Indians). This court disagrees, however, with the conclusion drawn by the State that from statehood Oklahoma has had the right to tax Indian tribes and Indian property. That conclusion is unsupproted by *Egan*. The Court there also said:

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15 Act of June 16, 1906, ch. 3335, 34 Stat. 267

16 Okla. Const. art. 1, §3.

> [E]ven on reservations state laws may be applied to Indians *unless such application would interfere with reservation self-government* or impair a right granted or reserved by federal law . . . State authority over Indians is yet more extensive over activities . . . not on any reservation . . .
>
> . . .[S]tate regulation of off-reservation fishing certainly does not impinge on *treaty-protected reservation self-government,* the factor found in *Williams v. Lee.*

Id. at 75-76, 82 S.Ct. at 571 (emphasis added).

While Oklahoma may have retained governmental interests in Creek land and property, not every governmental interest it possesses as a sovereign can be asserted against the Creeks. Oklahoma is precluded from exercising those governmental interests that impinge upon the Creek's federally protected rights of tribal self-governmental. *See McClanahan,* 411U.S. at 176 n.15, 93 S.Ct. at 1264 n.5. *Cf. Currey v. Corporation Commisson of Oklahoma,* 617 P.2d 177, 180 (1979) (Oklahoma sovereignty over restricted Indian land is enlarged to the extent the federal government, through an act of Congress, withdrew from pre-emption in the field of oil and gas conservation).

Similarly unavailing is the State's assertion that because Congress expressed no intention to withdraw Oklahoma's power to generally tax the tribe or tribal lands that, by omission or negative implication, Congress consented to such power. If such authority existed in 1906, then the later actions of Congress in authorizing certain state taxes become inexplicable. *See e.g.,* Act of May 10, 1928, §3, 45 Stat., 495, 496 (specifically authorizing state taxes "of every kind and character" for minerals produced on restricted allotted lands of the Five Civilized Tribes).[17] *Cf.* Buck Act, 4 U.S.C. §109 (nothing in sections of Act authorizing sales, use and

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17 Significantly, the 1979 Creek Constitution, approved by the United States Department of the Interior, contains the following provisions:

> The political jurisdiction of the Muscogee (Creek) Nation shall be as it geographically appeared in 1900 which is based upon those Treaties entered into by the Muscogee (Creek) Nation and the United States of America; and such jurisdiction shall include, however

income tax in federal areas shall be construed to allow levy or collection of any tax on or from Indians not otherwise taxed). While none of these Acts can be seen as an affirmative tax exemption to the Creek Nation, it is obvious Congress would not have protected the immunity of Indians from state taxes had it thought the states had residual power to impose such taxes in any event. *McClanahan*, 411 U.S. at 177, 93 S.Ct. at 1265.[18]

Through numerous treaties and statutes, the Creek Nation has been solemnly promised the rights the self-determination and self-government. Certainly there have been historic attempts by the federal government to undermine those promises, but they nonetheless remain binding and have, in fact, been renewed. An integral attribute of self-government is the right to determine where tribal funds will go. *See Harjo*, 420 F. Supp. at 1142-43.

The power to tax is the power to destroy. If the State is permitted to treat the Creek Nation as a taxpayer, permitted to hold it liable for taxes due, delinquent taxes, penalties and interest, and permitted to put liens on Creek property until delinquencies are paid, then the State would be allowed an authority and power over the Creek Nation that flies in the face of the promises made to it. This court does not attribute any malevolent purpose to the State's actions. The fact remains, however, that the Creek Nation's sovereignty and self-government would be seriously eroded, if not destroyed, were the State permitted to impose this tax liability against it. This court finds such state authority is pre-empted by federal law.

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[17] (continued from page A-50)

> not limited to, properties held in trust by the United States of America and to such other properties as held by the Muscogee (Creek) Nation, such property, real and personal to be TAX-EXEMPT from Federal and State taxation, when not inconsistent with Federal law.

Creek Const. art. I, §2 (1979) (emphasis in original).

[18] The Court's reasoning in *McClanahan* with respect to Congressional consent to specific state taxes and the Buck Act is applicable to this case. The language in Oklahoma's Enabling Act is substantially the same as that found in the enabling acts of other states admitted to statehood after 1882, including Arizona. *See Arizona v. San Carlos Apache Tribe of Arizona*, 463 U.S. 545, 561, & n.12, 103 S.Ct. 3201, 3210-11 & n. 12 (1983).

B. Balancing of Interests Inquiry:

Not only is the State's authority to impose tax liability against the Creek Nation pre-empted by federal law, but its attempt to tax and regulate the tribal bingo activity is also invalid because the exercise of that state authority interferes with the Creek Nation's ability to exercise its sovereign functions. *Ramah*, 458 U.S. at 837, 102 S.Ct. at 3398; *White Moutain*, 448 U.S. at 142-43, 100 S.Ct. at 2583. Employing the balancing of interest inquiry set out in *Washington*, the court finds the State's interests in raising revenues, protecting its overall economy and regulating activities of its citizens are strong,[19] but under the circumstances, are outweighed by the interests of the Creek Nation and federal government. 447 U.S. at 156-57, 100 S.Ct. at 2083.

While there does not appear to be any definitive federal law that would pre-empt state regulation of bingo enterprises on Indian land, *see Cabazon Band of Mission Indians v. County of Riverside*, No. 84-6635 (9th Cir. Feb. 25, 1986) (available on WESTLAW, CTA9) (published opinion not yet available in slip opinion), it cannot be doubted that current federal policy is one aimed at fostering tribal self-government and economic development. *Kerr-McGee Corp. v. Navajo Tribe*, ___U.S.___, 105 S.Ct. 1900, 1904 (1985); *New Mexico v. Mescalero Apache Tribe, 462 U.S. 324*, 103 S.Ct. 2378 (9183). The statement by the President[20] regarding Indian policy evidences the substantial federal interest in fostering tribal self-determination and Indian control of Indian resources, and removing impediments to tribal economic development. A growing economy promotes self-sufficiency, decreases dependency upon public resources, and provides jobs and revenues for essential

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19 The court also recognizes the State's public policy interest in the possible infiltration of organized crime in business activities general. The State, however, is not the only sovereign in this lawsuit who has a concern over organized crime: the Creek Nation also has a substantial interest in keeping its tribal bingo enterprise free from such criminal activity. In fact, the State has conceded that there is neither evidence nor even suspicion of organized criminal activity with respect to the tribal bingo enterprise.

20 Statement by the President: Indian policy, the White House. 19 Weekly Comp. Pres. Doc. 98, 99 (Jan 24, 1983).

services. The implementation of this policy has involved the approval and endorsement of economic development through commonly used means, such as the use of private venture capital and management expertise. The Secretary of Interior, consistent with his fiduciary status, has assisted the Creeks and other tribes in their economic development efforts by developing guidelines for management contracts used in the operation of bingo enterprises.

This federal policy is also seen in numerous federal statutes designed "to rehabilitate the Indians's economic life and to give him a chance to develop the initiative destroyed by a century of oppression and paternalism." *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 152, 93 S.Ct. 1267, 1272 (1973) (referring to the purpose of the enactment of the Indian Reorganization Act of 1934, ch. 576, 48 Stat. 984). In 1936 Congress passed the Oklahoma Indian Welfare Act, 49 Stat. 167, which authorizes Indian tribes in Oklahoma to reorganize as constitutional governments. In 1975, the Indian Self-Determination and Educational Assistance Act, 25 U.S.C. §§ 450 *et seq.*, was enacted to enable tribes to assume control of services and programs. Direct financial assistance for the promotion of economic development was provided by the Indian Financing Act of 1974, 25 U.S.C. §§ 1451 *et seq.*

The Creek Nation's interest in being free from state regulation and taxation is also strong. The tribal bingo enterprise generates valuable revenues used by the Creek Nation for an array of legitimate and pressing concerns. Revenues thus raised are used to enable the Creek Nation to be self-sufficient in its internal affairs and to address the needs of the tribe, including employment, health care, nutrition, housing and education. Ordinance No. NCA-84-04, Section 101. Moreover, Creek Nation Bingo has created jobs. A number of those jobs are held by members of the Creek tribe; many of those members were unemployed prior to working for the tribal bingo enterprise. Even apart from the revenues flowing to the Creek Nation from the bingo enterprise, the payment of wages by the enterprise to those members is of tremendous benefit to the Creek Nation. The State's attempt to regulate the bingo enterprise and impose its sales tax Code on that enterprise would substantially reduce the revenues and economic benefits currently realized by the Creek Nation and impede its ability to carry out its legitimate and paramount concerns of self-sufficiency and economic development.

The scale is further tipped in favor of the Creek's interest in being free from the state taxing and regulatory scheme, because the thing of value being marketed here is created, sold and consumed on tribal land through tribal activities. This situation is quite different from the taxable activity in *Washington*. There the state's taxing interest outweighed the tribe's interest because the taxable product was imported onto the reservation for resale and consumed off the reservation. 447 U.S. at 156-57, 100 S.Ct. at 2083. Here the Creek Nation's interest in generating revenues for essential governmental programs is stronger than the State's interest because the revenues are derived from value generated on Creek lands by activities involving the tribe. *See Cabazon*, No. 84-6635.

This court finds that the interests of the tribe in its sovereignty, self-government and control over its own lands and activities outweigh the interest of the state enumerated here. Those state interests are further outweighed by the interests of the tribe and federal government in the economic self-sufficiency of the tribe and the vital purposes to which the revenues will be put.[21]

C. Use Tax

Indian lands are exempt from state taxation, as are permanent improvements upon such lands. *Mescalero Apache Tribe v. Jones*, 411 U.S. at 148, 93 S.Ct. at 1270. Consequently, the Creek Nation Bingo hall itself and the materials used to build the structure are exempt from use tax, as they are a permanent improvement and have become a part of exempt Indian land.

TAX INJUNCTION ACT

The court finds that the Tax Injunction Act, 28 U.S.C. §1341, does not bar the Creek Nation's action to enjoin the collection of taxes. In *Moe*, the Court discussed §1341 and 28 U.S.C. §1362, which gives district courts "original jurisdiction over all civil actions, brought by any Indian tribe or band ...wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States." The Court said that where the United States could

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[21] Moreover, were this court to have found that the interests involved were evenly balanced, the court would be compelled to find in favor of the tribe. *Ramah*, 458 U.S. at 838, 102 S.Ct. at 3399.

States." The Court said that where the United States could have sued under §1362 but the tribe brought suit on its own, that in certain respects the tribe was to be accorded treatment similar to the United States. 425 U.S. at 475, 96 S.Ct. at 1642. The Court held that since the United States is not barred by §1341 from seeking to enjoin enforcement of a state tax law, neither was the tribe.[22]

The exception provided by §1362, however, is not available to plaintiff Indian Country U.S.A., Inc., which is not an Indian tribe as contemplated by the provisions of the Act. *See Moe,* 425 U.S. at 475 n.14, 96 S.Ct. at 1642 n. 14. Thus, Indian Country U.S.A., Inc., may not maintain an action in this court to enjoin the collection of taxes and must be dismissed.

The court further finds, however, that the dismissal of Indian Country U.S.A., Inc., as a party does not affect the scope of relief that may be granted to the tribe to protect itself, its tribal bingo enterprise and its agents from the actions of the state.

STATE NUISANCE ACTION

On July 9, 1985, a Petition for Injunction was filed in Tulsa County District Court, in which the plaintiff State of Oklahoma *ex rel.* David Moss, District Attorney, sought to permanently restrain

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[22] The Eleventh Amendment does not bar this action by the Creek Nation even though the State has not consented to the suit.

> Congress, in the exercise of its enumerated powers, may strip a state of its Eleventh Amendment immunity . . . Given the rationale used by the Court in *Moe* . . . in construing 28 U.S.C. §1362, we must conclude that Congress has removed the states' Eleventh Amendment immunity when a suit is brought by an Indian tribe. *Aquilar v. Kleppe,* 424 F. Supp. 433, 436 (D. Alaska 1976).

Confederated Tribes of Colville v. State of Washington, 446 F. Supp. 1339, 1350 (1978), *aff'd as modified,* 447 U.S. 134, 100 S.Ct. 2069 (1980) (issue of Eleventh Amendment not discussed on appeal). *See also Oneida Indian Nation of New York v. State of New York,* 691 F.2d 1070, 1079-1080 (2d Cir. 1982). *But see Standing Rock Sioux Indian Tribe v. Dorgan,* 505 F.2d 1135, 1138, 1140 (1974) (held Eleventh Amendment barred action by Indian tribe to collect money for taxes paid, but court specifically found United States had no interest in action so §1362 could not raise tribe to the position of the United States).

and enjoin violations of the state bingo laws by defendants Muscogee (Creek) Nation and others at the Creek Nation Bingo hall. The action was brought pursuant to Okla. Stat. tit. 21 §§995.1 - 995.15 and 946 (Supp. 1983 and 1984), which declare violations of the state bingo laws and the facility in which such violations occur to be a public nuisance. The commission or maintenance of a public nuisance is a misdemeanor under Oklahoma law, Okla. Stat. tit. 21, §1191 (1981), and may be enjoined by action of the state. Okla. Stat. tit. 50, §§1, 2, 5, 11 (1981).

Petition for removal to federal district court was filed July 15, 1985, as Case No. 85-C-658-E. Subsequently, plaintiff State moved to dismiss the petition for removal: more properly, to remand the action to state court.

The jurisdiction of a federal court is limited, and the court is to construe the removal statute strictly. *Shamrock Oil & Gas Corp. v. Sheets,* 313 U.S. 100, 108, 61 S.Ct. 868, 872 (1941). In a doubtful case, or when the right to removal is questionable, the court should decline jurisdiction and remand the case. *Putterman v. Daveler,* 169 F. Supp. 125, 130 (D.Del. 1958).

"[A]ny civil action brought in a State court of which the district courts of the United States have original jurisidiction . . . " may be removed. 28 U.S.C. §1441(a). Section 1441(b) allows removal of such an action "founded on a claim or right arising under the Constitution, treaties or laws of the United States" without regard to the citizenship of the parties. A suit is said to "arise under" the laws of the United States if the required federal right or immunity is "an essential element of the plaintiff's cause of action . . ." and the federal controversy is "disclosed upon the face of the complaint, unaided by the answer or by the petition for removal." *Madsen v. Prudential Federal Savings & Loan Assoc.,* 635 F.2d 797, 800 (10th Cir. 1980) (citation omitted). A defendant's assertion of a defense, or right to a defense predicated on federal law is not enough by itself to confer federal jurisdiction. *Id.* at 800-801; *State of Oklahoma ex rel. Grimes v. United Health & Retirement Assoc.,* 436 F. Supp. 550, 551 (W.D. Okla. 1977).

The removal action was based upon the bingo and nuisance laws of the State of Oklahoma. The federal questions which would be raised in the defense of that action do not form the basis of the petition to enjoin a nuisance under state law. The court finds that this is not an action of which the courts of the United States have

original jurisdiction, and that it must, therefore, be remanded to the Tulsa County District Court. [23]

IT IS THEREFORE ORDERED that the motion of the State of Oklahoma *ex rel.* the District Attorney for Tulsa County to dismiss Indian Country U.S.A., Inc., be, and the same is hereby granted.

IT IS FURTHER ORDERED that the motion of the State of Oklahoma *ex rel.* David Moss, District Attorney to remand case number 85-C-658-E be, and the same is hereby granted.

IT IS FURTHER ORDERED that, the relief requested by the Plaintiff having been granted as set forth above, a permanent injunction shall issue.

So ordered this 24th day of April, 1986.

Signature of JAMES O. ELLISON
UNITED STATES DISTRICT JUDGE

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[23] This court may enjoin ongoing state proceedings where necessary to protect and effectuate its judgments. 28 U.S.C. §2283. The injunction runs against state court proceedings, not the litigants. *Atlantic Coast Line Railroad Co. v. Brotherhood of Locomotive Engineers*, 398 U.S. 281, 287-88, 90 Ct. 1739, 1743-44 (1970). In view of the orders and permanent injunction issued by this court in Case No. 85-C-643-E, however, the court sees no reason why it should enjoin, at this time, the remanded state court proceedings. This court has no reason to assume the state court will disregard this court's final orders or that the State or its agents and officials will violate the permanent injunction.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No. 1733 EQUITY
	)	
PHILLIP MACKEY, et al.,	)	
	)	
Defendants.	)	

DECREE

NOW, on this, the 13th day of July, 1925, the above styled cause comes on for hearing upon the Stipulation for Settlement by the parties herein, and the plaintiff appears by its counsel, Eustace Smith, Special Assistant to the Attorney General, and O.H. Graves, Assistant United States Attorney, and the defendants appearing by their attorney of record, John T. Harley, of Tulsa, Oklahoma, who, together with such stipulation, presents the written authroity of each of the defendants, Phillip Mackey, Lovely Mackey and Mary Mackey, to enter into said stipulation.

IT IS THEREFORE CONSIDERED, ORDERED and ADJUDGED that, purusant to the Stipulation filed herein and the waiver of appeal by defendants set forth therein, that the defendants, Phillip Mackey, Lovely Mackey and Mary Mackey, receive of Thomas J. Lyons, Receiver, a sum equal to one-fourth of the funds now impounded in the hands of said Receiver, said payment to be made by said Receiver's check made payable jointly to Phillip Mackey, Lovely Mackey and Mary Mackey, and John T. Harley, their attorney of record.

That the Untied States, Plaintiff, shall have and receive, for and on behalf of the Creek Tribe of Indians, the remaining seventy-five (75%) per cent of the funds now impounded and in the possession of Thomas J. Lyons, Receiver.

That, out of the said seventy-five (75%) per cent of such funds so received, the plaintiff shall pay the costs herein.

That the plaintiff, for and on behalf of the Creek Tribe of Indians, shall have and receive all of the funds arising from royalties produced on upon and arising from the land in controversy after this date: to wit July 13, 1925, that the title in and to the land in controversy lying between the meander line of the Arkansas River in Section eighteen (18), Township eighteen (18) North, Range thirteen (13) East, in Tulsa County, Oklahoma, opposite and West of the land allotted to Louisa Mackey in said Section, and the thread of the stream of the Arkansas River at such point as adjudged to be in the Creek Tribe of Indians is further confirmed by this agreement and adjudication.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the title in and to the land in controversy, to-wit: The land located between the meander line on the left bank of the Arkansas River in Section eighteen (18), Township eighteen (18) North, Range thirteen (13) East, located opposite to and west of the land in said Section allotted to Louisa Mackey, and the thread of the stream of the Arkansas River at such point, be and the same is, declared to be in the Creek Tribe of Indians and is quieted in them, and the defendants, Phillip Mackey, Lovely Mackey, and Mary Mackey, are enjoined and restrained from hereafter asserting any right, title or interest therein.

(Signed by) R.L. WILLIAMS,
JUDGE

APPENDIX D

18 U.S.C. §1151

Except as otherwise provided in sections 1154 and 1156 of this title, the term "Indian country", as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

APPENDIX E

Title 68 Oklahoma Statutes §232

When any reports required under any state tax law have not been filed or may be insufficient to furnish all the information required by the Tax Commission, or when the taxes imposed by any state tax law have not been paid, the Tax Commission may institute, in the name of the State of Oklahoma upon relation of the Tax Commission, any necessary action or proceedings to enjoin such person, firm, or corporation from continuing operations until such reports have been filed or taxes paid as required, and in all proper cases, including but not limited to cases in which the evidence establishes that a taxpayer has repeatedly failed to collect and remit sales or withholding taxes, injunction shall be issued without a bond being required from the state. After an action to enjoin the operation of any person, firm or corporation has been instituted by the Tax Commission a payout agreement under which the delinquent taxpayer is to make periodic payments toward the satisfaction of the tax debt may only be entered into upon the specific request or motion of the Tax Commission. Upon a proper showing in any such action that the claim of the state for taxes is in danger of being lost or rendered uncollectible by reason of the mismanagement, dissipation or concealment of the property by the taxpayer and a request is made for the appointment of a receiver to manage the property of the taxpayer, a receiver shall be appointed.

APPENDIX F

Title 68 Oklahoma Statutes §1354

1. There is hereby levied upon all sales, not otherwise exempted in the Oklahoma Sales Tax Code,[1] an excise tax of three and one-fourth percent (3 1/4%) of the gross receipts or gross proceeds of each sale of the following:

(A) Tangible personal property;

* * * * *

(E) Printing or printed matter of all types, kinds, or character and any service of printing or overprinting, including the copying of information by mimeograph, multigraph, or by otherwise duplicating written or printed matter in any manner, or the production of microfiche containing information or magnetic tapes furnished by customers;

* * * * *

(I) Foods, confections, and all drinks sold or dispensed by hotels, restaurants, or other dispensers, and sold for immediate consumption upon the premises or delivered or carried away from the premises for consumption elsewhere;

* * * * *

(L) Tickets for admission to or voluntary contributions made to places of amusement, sports, entertainment, exhibition, display, or other recreational events or activities, including free or complimentary admissions which have a value equivalent to the charge that would have otherwise been made;

* * * * *

(M) Charges made for the privilege of entering or engaging in any kind of activity, such as tennis, racquetball, or handball, when spectators are charged no admission fee;

* * * * *

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[1] Section 1350 et seq. of this title.

APPENDIX G

Title 68 Oklahoma Statutes §1361

Consumer to Pay Tax–Vendor to Collect Tax–Penalties for Failure to Collect.

(A) The tax levied by this article shall be paid by the consumer or user to the vendor as trustee for and on account of this state. Each and every vendor in this state shall collect from the consumer or user the full amount of the tax levied by this article, or an amount equal as nearly as possible or practicable to the average equivalent thereof. Every person required to collect any tax imposed by this article, and in the case of a corporation, each principal officer thereof, shall be personally liable for said tax.

(B) Vendors shall add the tax imposed by this article, or the average equivalent therof, to the sales price, charge, consideration, gross receipts or gross proceeds of the sale of tangible personal property or services taxed by this article, and when added such tax shall constitute a part of such price or charge, shall be a debt from the consumer or user to vendor until paid, and shall be recoverable at law in the same manner as other debts.

* * * * *

APPENDIX H

Title 68 Oklahoma Statutes §1367

Discount

At the time of filing the reports required under this article, to the Tax Commission, the vendor shall remit therewith to the Tax Commission, except as hereinafter provided, ninety-seven percent (97%) of the tax due under the applicable provisions of this article, and failure to remit such tax at the time of filing the returns shall cause said tax to become delinquent; provided, however, in the event the payment of any tax due under the applicable provisions of this article becomes delinquent for a period of five (5) days the taxpayer forfeits his claim to the three percent (3%)[1] discount and must remit to the Tax Commission one hundred percent (100%) of the amount of tax due plus any penalty due. This discount is allowed the seller or vendor to remunerate him for keeping sales tax records, filing reports and remitting the tax when due as required by this article.

[1] Effective June 1, 1987 the discount was changed form 3% to 2 1/2%.

Supreme Court, U.S.
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No. 87-1068

In The
Supreme Court of the United States
October Term, 1987

—o—

OKLAHOMA TAX COMMISSION,

Petitioner,

vs.

THE MUSCOGEE (CREEK) NATION, *et al.*,

Respondents.

—o—

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

—o—

JOHN ECHOLS
ECHOLS & ECHOLS, INC.
P.O. Box 701196
Tulsa, OK 74170-1196
918/496-3176

Attorneys for the Respondents

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

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Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The Respondents, the Muscogee (Creek) Nation,[1] and Indian Country U.S.A., Inc.,[2] respectfully pray that the

1. The Muscogee (Creek) Nation is a federally recognized Indian Tribe. (For convenience, the Tribe will be referred to as the Creek Nation in this brief.) Extensive evidence regarding the history, customs, traditions, needs and aspirations of the Creek Nation and the Creek people was presented to the District Court during the trial of this case. Both the District Court and the Court of Appeals included summaries of Creek history in their respective opinions. See also, *Harjo vs. Kleppe*, 420 F. Supp. 1110 (D.D.C., 1976), *aff'd sub nom., Harjo vs. Andrus*, 581 F. 2d 949 (D.C. Cir., 1978), which contains an extended discussion of the history of the Creek Nation.

2. Indian Country U.S.A., Inc., is the general partner in Indian Country U.S.A.-Limited Partnership No. 1. The corporation

(Continued on following page)

Petitioner's request for a *writ of certiorari* will be denied. In support of their request that the Writ be denied, the Respondents would inform the Court of the following circumstances and authorities:

PROPOSITION I: THE OPINION OF THE COURT OF APPEALS IS A WELL CONSIDERED AND RESPONSIBLE APPLICATION OF SETTLED LAW, AND IT SHOULD NOT BE REVIEWED ON CERTIORARI.

Review by *Writ of Certiorari* in the Supreme Court of the United States is not a matter of right. Rule 17 of the Rules for the Supreme Court of the United States sets out the criteria to be used in determining whether review by the Supreme Court is necessary or proper in a given case. Generally speaking, the rule recognizes that the Supreme Court is an institution with tremendous demands on its time, and that it should only be called upon to review decisions of the Courts of Appeals which concern areas of unsettled law or which have departed from established precedent. The record in this case makes it clear that this is hardly a case meriting further review, or one which might likely result in a reversal.

(Continued from previous page)

("ICUSA") has contracted with the Creek Nation to provide management services and, through its associated limited partnership, venture capital for the creation and operation of the Tribal Enterprise, Creek Nation Bingo, ICUSA joined with the Creek Nation in the original District Court action for declaratory and injunctive relief in the summer of 1985. The District Court ruled that ICUSA lacked standing in its own right. This portion of the trial court's decision was reversed by the Tenth Circuit Court of Appeals which recognized the right of ICUSA to participate as a party in this litigation. The Petitioner has not challenged that ruling in its Petition for a Writ of Certiorari.

A. THE DISTRICT COURT'S FINDINGS OF FACT ARE AMPLY SUPPORTED BY THE RECORD.

The facts in this case were proven in a hotly contested trial, and the factual findings of the District Court,[3] as adopted by the Court of Appeals, should not be disturbed unless clearly erroneous and completely unsupported by the record. There is simply no reason to believe that the District Court acted improperly or imprudently in promulgating its factual findings. To the contrary, the record in this case establishes that the District Court gave careful consideration to all of the evidence presented. The District Court's findings are presented in a clear, cogent and logically compelling fashion, and this Court need not devote its scarce time to resifting the factual record.[4]

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3. Virtually every aspect of the factual and historical record was at issue in the trial, including without limitation: 1) the history of the Creek Nation; 2) the history of the relationship between the Creek Nation and the federal government; 3) the nature of federal policy toward the Creek Nation; 4) the history of the State of Oklahoma; 5) the history of the land on which the Tribal Enterprise was situated; 6) the nature and history of the Tribal Enterprise itself; and, 7) the respective (and arguably competing) sovereign needs and interests of the Creek Nation and the State of Oklahoma.

4. Rather than argue that the District Court's Findings of Fact are unsupported by the record (something of an impossible task), the State of Oklahoma simply ignores the District Court's Findings and flatly states "facts" to the contrary. See the final partial paragraph on page 7 of the Petitioner's Brief, in which the Petitioner badly asserts:

> . . . Under [the Curtis Act and the General Allotment Act of 1901] *the Mackey Site, now owned by the Tribe, was allotted to Louisa Mackey* along with other land beside the Arkansas River in Tulsa County, Oklahoma. . . . [*emphasis* added]

(Continued on following page)

The standard for review of such findings on appeal is that the District Court's findings of fact will not be disturbed unless they can be said to be clearly erroneous. The case below was decided after the conclusion of a lengthy trial in which all parties were afforded an opportunity to bring forth evidence in support of their respective positions. The District Court then properly based its decision on the record which had been made before it. Just as it would have been improper for the District Court to have speculated on evidence which might have been presented, so too it would have been improper for the Court of Appeals to have strayed outside of the evidence admitted below.[5] *AMOCO Production Company vs. Western Slope Gas Company*, 754 F.2d 303 (10th Cir., 1985).

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This is a complete misstatement of the record. Quite to the contrary, the facts established and *the District Court and Court of Appeals found that the Mackey Site had never been allotted to anyone, and that the Creek Nation could trace an unbroken and continuous title directly back to the Land Patent it had received from President Millard Filmore in 1832.* (See discussion regarding the Indian Country status of the Mackey Site at page 6, *infra*.)

5. The inquiry would not be whether the District Court reached the correct decision, but only whether it reached a conclusion that was permissible in light of the evidence. *An-son Corporation vs. Holland-America Insurance Company*, 767 F.2d 700 (10th Cir., 1985). Because Indian history and Indian law are intertwined as in no other area of law (with history being the dominant element), it is particularly important that the reviewing Court give substantial deference to the findings of the trial Court.

B. THE DISTRICT COURT AND COURT OF APPEALS WERE REQUIRED TO CONSTRUE ALL TREATIES, STATUTES AND OTHER LAWS IN FAVOR OF THE CREEK NATION.

The Supreme Court of the United States has repeatedly advised the District Courts and Courts of Appeals that all matters open to interpretation in matters affecting the rights of Indian Tribes are to be construed liberally in favor of the Indians. In *Montana, et al. vs. Blackfeet Tribe of Indians*, 471 U.S. 759, 105 S.Ct. 2399, 85 L.Ed.2d 753 (1985), this Court restated the principle:

> . . . The State fails to appreciate, however, that the standard principles of statutory construction do not have their usual force in cases involving Indian law. As we said earlier this Term, '[t]he canons of construction applicable in Indian law are rooted in the unique trust relationship between the United States and the Indians.' [citation omitted] Two such canons are directly applicable in this case: first, the States may tax Indians only when Congress has manifested clearly its consent to such taxation, [citation omitted]; second, statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit[.] [citation omitted]

Treaties are particularly in need of protective interpretation. In *Choctaw Nation vs. United States*, 318 U.S. 423, 431-32, 63 S.Ct. 672, 87 L.Ed. 877 (1943), this Court stated:

> . . . Treaties were imposed upon them [Indians] and they had no choice but to consent. As a consequence, this Court has often held that Treaties with the Indians must be interpreted as they would have understood them . . . and any doubtful expressions in them should be resolved in the Indians favor.

Both the District Court and the Court of Appeals were required to follow these standards in interpreting the law to be applied to this case, particularly in view of this Court's recent decision in *California, et al., vs. Cabazon Band of Mission Indians, et al.*, — U.S. —, 107 S.Ct. 1083, — L.Ed.2d — (1987). Applying these clearly defined standards to the carefully considered opinions of the District Court and the Court of Appeals, it is unlikely that the Supreme Court would conclude that the Court of Appeals acted in any other than a proper and responsible fashion when it upheld the Findings of Fact and Conclusions of Law of the District Court.

C. THE OPINIONS OF THE DISTRICT COURT AND THE TENTH CIRCUIT COURT OF APPEALS ARE WELL CONSIDERED AND RESPONSIBLE APPLICATIONS OF SETTLED LAW.

The Petitioner has raised only two issues for possible consideration by this Court, and neither issue involves an area of unsettled or novel law. The Petitioner's first claim is that the Court of Appeals (and before it the District Court) made a mistake in applying the balancing of interests test required by *Washington vs. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 100 S.Ct. 2069, 65 L.Ed.2d 10 (1980). The Petitioner's second claim is that the Court of Appeals (and before it the District Court) mistakenly determined that the Mackey Site is Indian Country within the meaning of 18 U.S.C. § 1151.

Each of these "Questions Presented" concerns the application of well settled law to the facts of this particular case. As such, neither question presents a proper issue

under Supreme Court Rule 17, and neither should be the basis for granting a *writ of certiorari*. Moreover, as is demonstrated in the remaining sections of this brief, the opinions of the District Court and the Court of Appeals establish that each Court gave careful consideration to the relevant law and properly applied the relevant law to the facts proven at trial. As such, the actions of the District Court and the Court of Appeals were entirely proper and need not be subjected to further review.

PROPOSITION II. BOTH THE DISTRICT COURT AND THE COURT OF APPEALS PROPERLY BALANCED THE COMPETING INTERESTS OF THE STATE OF OKLAHOMA AND THE CREEK NATION WITH REGARD TO THE REGULATION AND TAXATION OF THE TRIBAL ENTERPRISE CREEK NATION BINGO.

The Petitioner complains that the District Court and the Court of Appeals failed to rule in its favor after balancing the competing interests of the State of Oklahoma and the Creek Nation with regard to the regulation and taxation of the Tribal Enterprise known as Creek Nation Bingo. While these Courts certainly did rule against the State, it is clear from their respective opinions that each was well aware of the controlling legal principles and that each was careful to give due consideration to the competing sovereigns.[6]

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6. Indeed, if anything, the Courts below were too willing to grant to the State the right to speculate about its claimed

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The District Court resolved the balancing issues in these words:

> The Creek Nation's interest in being free from state regulation and taxation is also strong. The tribal bingo enterprise generates valuable revenues used by the Creek Nation for an array of legitimate and pressing concerns. Revenues thus raised are used to enable the Creek Nation to be self-sufficient in its internal affairs and to address the needs of the tribe, including employment, health care, nutrition, housing and education. Ordinance No. NCA-84-04, Section 101. Moreover, Creek Nation Bingo has created jobs. A number of those jobs are held by members of the Creek tribe; many of those members were unemployed prior to working for the tribal bingo enterprise. Even apart from the revenues flowing to the Creek Nation from the bingo enterprise, the payment of wages by the enterprise to those members is of tremendous benefit to the Creek Nation. The State's attempt to regulate the bingo enterprise and impose its sales tax Code on that enterprise would substantially reduce the revenues and economic benefits currently realized by the Creek Nation and impede its ability to carry out its legitimate and paramount concerns of self-sufficiency and economic development. The scale is further tipped in favor of the Creek's interest in being free from the state taxing and regulatory scheme, because the thing of value being marketed here is created, sold and consumed on tribal land through tribal activities. This situation is quite different from the taxable activity in *Washington* [*vs. Confederated Tribes of the Col-*

(Continued from previous page)

interests, even though the Petitioners failed to introduce any evidence of any such interests at trial. At the very least, such evidence should be required to be produced in Court if it is to be held out as the justification for the wholesale invasion of tribal sovereignty.

> *ville Indian Reservation*]. There the state's taxing interest outweighed the tribe's interest because the taxable product was imported onto the reservation for resale and consumed off the reservation. 447 U.S. at 156-57, 100 S.Ct. at 2083. Here the Creek Nation's interest in generating revenues for essential governmental programs is stronger than the State's interest because the revenues are derived from value generated on Creek lands by activities involving the tribe. [citation omitted]
>
> This Court finds that the interests of the tribe in its sovereignty, self-government and control over its own lands and activities outweigh the interest of the state enumerated here. Those state interests are further outweighed by the interests of the tribe and federal government in the economic self-sufficiency of the tribe and the vital purposes to which the revenues will be put. [footnote omitted]
>
> [From the opinion of the District Court, beginning at page A-53 of the Appendix to the Petitioner's Brief.]

The Court of Appeals approved of the actions of the District Court and then repeated the same balancing process in a step by step process closely following *Cabazon:*

> . . . Thus, when a state "asserts authority over the conduct of non-Indians engaging in activity on the reservation," [*White Mountain Apache Tribe vs. Bracker,* 448 U.S. 136, 143, 100 S.Ct. 2578, 65 L.Ed.2d 665 (1980)], at 144, the Court has instructed us to engage in "a particularized inquiry into the nature of the state, federal, and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law." *Id.* at 145. Such an inquiry focuses on an examination of "the language of the relevant federal treaties and statutes in terms of both the broad policies that underlie them and the notions of sovereignty that have developed from historical traditions

> of tribal independence." *Id.* at 144-45. "State jurisdiction is preempted by the operation of federal law if it interferes or is incompatible with federal and tribal interests reflected in federal law, unless the state interests at stake are sufficient to justify the assertion of state authority." [*New Mexico vs. Mescalaro Apache Tribe*, 462 U.S. 324, at 334, 103 S. Ct. 2378, 2386, 76 L.Ed.2d 611 (1983).] For the reasons that follow, we conclude that the state's interest in taxing Creek bingo and related activities is minimal, and is incompatible[7] with and outweighed by federal and tribal interests.
>
> [From the opinion of the Court of Appeals, beginning at page A-29 of the Appendix to the Petitioner's Brief.]

There can be no doubt that the principles of *Colville* were not only recognized but were scrupulously applied by both the District Court and the Court of Appeals. That the outcome was in favor of the Creek Nation is simply a reflection of the facts of this case.

PROPOSITION III: THE MACKEY SITE IS INDIAN COUNTRY IN ITS PUREST FORM.

The Mackey Site,[8] on which the Creek Nation operates its Tribal Bingo Enterprise, is a portion of the original

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7. This word is mistakenly reproduced as "compatible" in the Appendix to the Petitioner's Brief, however, the word used by the Court of Appeals is certainly "incompatible" with this typographical error.

8. The land in question is properly described as:

> Beginning at the NW corner of Lot 1 of Section 18, Township 18 North, Range 13 East, thence in a general southeasterly direction with the so-called meander line forming the West boundary of Lots 1, 5 and 6 to its intersection with the section line between Sections

(Continued on following page)

land which was acquired by the Tribe as partial compensation for the loss of Tribal property east of the Mississippi River, and for the forced removal of the Creek Nation to the area now known as the State of Oklahoma.[9] As such, it has been a part of the Creek reservation for more than 150 continuous years.[10]

The District Court concluded its discussion of the Mackey Site issues in this way:[11]

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17 and 18; thence West to the thread of the stream of the Arkansas River; thence up said river with the thread of the stream to a point where it intersects the section line between Sections 18 and 7; thence East to point of beginning, containing 100 acres, more or less, Tulsa County, Oklahoma.

9. This shameful episode in American history is remembered as The Trail of Tears.

10. At trial the State argued that the Mackey site had lost its "Indian Country" character by virtue of its allegedly having been allotted to Louisa Mackey, a freedman, shortly after the turn of the century. In actual fact the land merely *adjoined* land allotted to Louisa Mackey, and the Creek Nations title vis a vis Ms. Mackey had been cleared in a quiet title action ending in 1925. *United States vs. Mackey*, Final Decree of the Court, dated the seventh day of March, 1925. Because the State of Oklahoma was a party Intervenor in the *Mackey* case, the State is bound by the doctrine of *res judicata*, and it is estopped from asserting any claim adverse to the decision in that case.

11. See the testimony of Dean Rennard Strickland, Editor in Chief of Felix S. Cohen, *Handbook of Federal Indian Law* (1982 ed) and a leading historian of the Five Civilized Tribes at page 113, beginning at line 18:

Q: Dean Strickland, under circumstances such as this where we have a chain of title recognized in the

(Continued on following page)

The Mackey site was a part of the original Creek estate derived by treaty and patent from the United States government. It remained a part of that estate after the Treaty of 1866. The Mackey site was not part of the Creek lands allotted to the tribe's members by the terms of the Five Tribes Act, 34 Stat. 137. The Court recognizes that the Five Tribes Act contemplated the dissolution of the Creek Nation and specifically provided that lands held by the tribe at the time of dissolution would be held in trust by the United States government. Section 27, 34 Stat. 137, 148. Yet the federal government has treated the Mackey site as trust property even though the tribe

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(Continued from previous page)

Mackey case, recognized by the Bureau's memorandum [and] dating back to the 1830's, do you have any trouble with the notion considering this land to be Indian Country?

A: I think it quite clearly is. It's the purest form. It has a title derived from a patent under an Indian treaty.

Mr. John Fritz, Acting Assistant Secretary of the Department of the Interior and head of the Bureau of Indian Affairs, testified before the District Court that the federal government officially recognizes the Indian Country status of the Mackey Site. For instance, at page 15 of the transcript of his testimony, Mr. Fritz states:

Q: (By Ms. Karshmer) Are you familiar with the term—we used it so I assume you are—Indian Country?

A: Yes, I am.

Q: Does the Department of the Interior consider the tribal lands held in trust for the Muscogee (Creek) Nation as being Indian Country?

A: I do. So I guess I am speaking on behalf of the Department. I view it as Indian Country based upon my knowledge and experience.

Q: And you are answering as the Acting Assistant Secretary of the Interior?

A: Yes, I am.

> was never dissolved as contemplated by the Act. The Mackey site is the purest form of Indian Country; it is land set apart for the use and benefit of the Creek Nation. This trust land is Indian Country under § 1151(a).
>
> [From the opinion of the District Court, beginning at page A-41 of the Appendix to the Petitioner's Brief.]

It is truly remarkable that the State continues to claim that the Mackey Site was allotted to a Creek Freedman at the beginning of this Century. *This is a frivolous allegation because the State lost this very same argument to the very same Creek Nation in 1925,* when the United States District Court for the Eastern District of Oklahoma promulgated its final decree in *United States vs. Mackey,* Final Decree of the Court, dated the seventh day of March, 1925. (See the Appendix to the Petitioner's Brief, beginning at page A-58) Because the State of Oklahoma was a party Intervenor in the *Mackey* case, the State was bound by the doctrine of *res judicata,* and was estopped from asserting any claim adverse to the decision in that case. The title to the Mackey Site was quieted in the Creek Nation *vis a vis* the state of Oklahoma over sixty years ago, and it cannot be undone at this late date.

Nor can the Petitioner successfully argue that this land cannot be considered to be § 1151 Indian Country because the Creek Nation doesn't live on a "reservation," because: 1) the lands were in fact historically considered to be the Creek "reservation" even though the Creek Nation has traditionally held fee title to its properties; and, 2) the federal Courts have consistently held that, for purposes of understanding whether a particular tract of land is "Indian Country" under 18 U.S.C. § 1151, it makes little or

no difference what label the Congress has used to describe the property set aside for the use and benefit of the Indian Nations.

Youngbear vs. Brewer, 415 F. Supp. 807, 809 (N.D. Iowa, 1976), *aff'd* 549 F. 2d 74 (8th Cir., 1977) provides:

> The determination of whether lands are considered "Indian Country" does not turn on the label used in designating them, *United States vs. McGowan,* 302 U.S. 535, 58 S. Ct. 296, 83 L. Ed. 410 (1938), nor on the manner in which the lands in question were acquired. [citation omitted] Rather the test is whether such lands have been set apart for the use, occupancy and protection of dependent Indian peoples.

Thus, the Mackey Site must be considered Indian Country, even though the lands of the Five Civilized Tribes were not always called, "reservations."[12] Moreover, the evidence presented below established that the Mackey Site is now held in Trust by the United States. Such Trust lands are § 1151 Indian Country, and they remain Indian Country even in those cases in which a reservation has been disestablished. *Cheyenne-Arapahoe Tribes of Oklahoma vs. the State of Oklahoma, et al.,* 618 F.2d 665 (10th Cir. 1980). Furthermore, in *United States vs. Chavez,* 290 U.S. 357, 54 S.Ct. 217, 78 L.Ed. 360 (1933), the United States Supreme Court held that "Indian Country" includes "any unceded lands owned or occupied by an Indian Nation.[13]

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12. Significantly, in the *Mackey* case in which both the State of Oklahoma and the Creek Nation were parties, the Mackey Site is specifically described as a part of the Creek "reservation." Also the Trial Court notes that Article 9 of the Treaty of 1866 specifically refers to the diminished Creek lands, as the, "reduced Creek reservation."

13. See also *United States vs. Sandoval,* 231 U.S. 28, 34 S.Ct. 1, 58 L.Ed. 107, 111 (1913).

No Act of Congress has ever terminated or disestablished the Creek reservation; neither on its face, nor by clear surrounding circumstances or legislative history. Such unallotted Tribal lands which have been set aside for the use of the Creek Nation for more than 150 years are indeed Indian Country in its purest form.[14]

—o—

CONCLUSION

For the reasons stated, the Respondents pray that the Court deny the Petitioner's request for a *writ of certiorari.*

Respectfully submitted as of February 3, 1988.

JOHN ECHOLS
ECHOLS & ECHOLS, INC.
P.O. Box 701196
Tulsa, OK 74170-1196
918/496-3176

Attorneys for the Respondents

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14. It is of absolutely no consequence that the State then attempts to rely upon the holding in *United States vs. Hayes,* 20 F.2d 873 (8th Cir., 1927) for a contrary opinion. In the first instance, the *Hayes* decision came two years after *Mackey* was decided, and the later decision cannot alter the effect of the *Mackey* decision on the Mackey site itself. Secondly, the *Hayes* decision declares the rights of riparian owners to river beds and streams, while the essence of the *Mackey* decision is that the Mackey site is not, and never was, riparian to Louisa Mackey's actual allotment land.

Supreme Court, U.S.
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No. 87-1068

In the Supreme Court of the United States

OCTOBER TERM, 1987

OKLAHOMA TAX COMMISSION, PETITIONER

v.

MUSCOGEE (CREEK) NATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

CHARLES FRIED
Solicitor General
ROGER J. MARZULLA
Assistant Attorney General
LAWRENCE G. WALLACE
Deputy Solicitor General
HARRIET S. SHAPIRO
Assistant to the Solicitor General
EDWARD J. SHAWAKER
LAURA E. FROSSARD
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

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OKLAHOMA TAX COMMISSION, PETITIONER

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's invitation to submit the views of the United States.

STATEMENT

1. This case concerns the application of the Oklahoma sales tax to high stakes bingo games operated by the Muscogee (Creek) Nation, a federally recognized Indian tribe. The bingo operation (Creek Nation Bingo) is located on a tribally-owned tract of land (the Mackey site) along the Arkansas River in Tulsa County, Oklahoma. Creek Nation Bingo is controlled and supervised by the Muscogee (Creek) Public Gaming Commissioner in accordance with a comprehensive gaming ordinance enacted by the Tribe. Creek Nation Bingo is operated by Indian Country, U.S.A., Inc. (ICUSA, Inc.), a non-Indian cor-

poration, under a management agreement approved by the Creek Nation and the Bureau of Indian Affairs.[1]

2. The Creek Nation was forcibly removed in the 1830's from its original homeland in the southeastern United States to what is now the eastern portion of the State of Oklahoma.[2] The Creek Nation was granted the new land in fee simple with the right to perpetual self-government. Treaty of Feb. 14, 1833, United States-Creek Nation, art. II, 7 Stat. 418-419; Treaty of Aug. 7, 1856, United States-Creek and Seminole Tribes, arts. II-IV, 11 Stat. 700. Following the Civil War, the United States required the Creeks to cede the western portion of their territory as a penalty for the Tribe's alliance with the Confederacy, but the Tribe's title to the remaining portion of the territory was reaffirmed. Treaty of June 14, 1866, United States-Creek Nation, art. III, 14 Stat. 786.

By 1890, when Oklahoma Territory was created adjacent to Indian Territory (Act of May 2, 1890, ch. 182, 26 Stat. 81), would-be settlers were strongly pressuring Con-

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[1] The Creek Nation obtained the start-up capital for its bingo operations from Indian Country, U.S.A., a limited partnership, of which ICUSA, Inc. is the general partner. Under the management agreement between ICUSA, Inc. and the Creek Nation, the capital investment is recovered from bingo profits (Pet. App. A41-A42 & n.10). The tribal share of the bingo profits is used to pay for medical services for tribal members (*id.* at A25). In addition, the operation assists tribal members by providing needed employment opportunities: 80% of Creek Nation Bingo employees are Creeks, and less than 10% of those tribal employees had prior jobs (*ibid.*).

[2] The Creeks and four other tribes (the Cherokees, Seminoles, Chicasaws, and Choctaws), collectively referred to as the Five Tribes or Five Civilized Tribes, were removed to land west of the State of Arkansas. Their lands were collectively referred to as Indian Territory, even though no territorial government was ever established there.

gress to open Indian Territory to settlement, and to unite the two territories as a state. See *Harjo* v. *Kleppe*, 420 F. Supp. 1110, 1121-1122 (D.D.C. 1976), aff'd, 581 F.2d 949 (D.C. Cir. 1978) (describing the history of federal legislation dealing with the Creek Nation). Congress responded by creating the Dawes Commission to negotiate with the Five Tribes to extinguish tribal land title and develop an allotment plan.[3] Appropriations Act of Mar. 3, 1893, ch. 209, § 16, 27 Stat. 645. For several years the Five Tribes refused to deal with the Dawes Commission. In 1898, Congress enacted the Curtis Act, which provided for forced allotment and eventual termination of tribal land ownership without tribal consent unless the Five Tribes agreed to allotment plans. Ch. 517, §§ 11, 30, 30 Stat. 497, 514. The Creek Nation eventually agreed to allotment of "[a]ll lands of said tribe" except town sites and lands reserved for Creek schools and churches, railroads, and town cemeteries. Act of Mar. 1, 1901 (Creek Agreement), ch. 676, §§ 2, 3, 24, 31 Stat. 862, 868-869; Act of June 30, 1902 (Supplemental Creek Agreement), ch. 1323, 32 Stat. 500. In preparation for the unificiation of Indian Territory with Oklahoma Territory, the agreement provided that the Creek tribal government would be dissolved by March 4, 1906. Creek Agreement § 46, 31 Stat. 872.

Difficulty in completion of the tribal rolls and resistance to the allotment process prevented the anticipated demise of the Five Tribes, and, on April 26, 1906, Congress extended indefinitely the tribal existence and tribal governments of each of the Five Tribes. Act of Apr. 26, 1906 (Five Tribes Act), ch. 1876, § 28, 34 Stat. 148. See

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[3] The Five Tribes had been excluded from the General Allotment Act of 1887, ch. 119 § 8, 24 Stat. 391, which provided for the allotment of Indian reservations and opening of the remaining land to non-Indian settlement.

Harjo v. *Kleppe*, 420 F. Supp. at 1128-1129 (describing legislative history of the Five Tribes Act). The Five Tribes Act also provided that, upon dissolution of the tribes, title to unallotted tribal land "shall not become public lands nor property of the United States" but shall be held in trust by the United States "for the use and benefit of the Indians respectively comprising each of said tribes" (§ 27, 34 Stat. 148). The Creek Nation government was never dissolved and the Creek Tribe has remained in existence (*Harjo* v. *Kleppe*, 420 F. Supp. at 1129-1143).

The Oklahoma Enabling Act of June 16, 1906, ch. 3335, 34 Stat. 267, provided for the creation of the State of Oklahoma from Oklahoma Territory and Indian Territory. The authority of the United States over Indians within the two territories was expressly retained (§ 1, 34 Stat. 267-268).[4]

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[4] The jurisdiction received by the federal and state courts in eastern Oklahoma when the State was created also reflects the unique history of the former Indian Territory. When the Five Tribes were first removed to Indian Territory in the 1830's, each tribe established its own government, including a judicial system, within its respective nation in the Territory. But the tribal courts had no criminal jurisdiction over non-Indians, and Indian Territory became a refuge for criminals from neighboring states. See *Oliphant* v. *Suquamish Indian Tribe*, 435 U.S. 191, 197-200 (1978). Congress accordingly established by the Act of Mar. 1, 1889, ch 333, § 1, 25 Stat. 783, a United States court having exclusive original jurisdiction over most criminal offenses against the laws of the United States committed within Indian Territory. Controversies between Indians were expressly excluded from the court's jurisdiction. The jurisdiction of the United States court in Indian Territory was enlarged by the Act of May 2, 1890, ch 182, § 29, 26 Stat. 93, to include all civil suits except those within the exclusive jurisdiction of the tribal courts. The federal court thus had jurisdiction over disputes between Indians and non-Indians, and between Indians of different tribes.

While the Dawes Commission was attempting to negotiate the extinguishment of tribal land title and the allotment of tribal land, the

3. The Creek Nation and ICUSA, Inc. (the operator of Creek Nation Bingo) brought this suit for declaratory and injunctive relief to prevent the State of Oklahoma from seeking to collect state sales and use taxes on the Creek Nation Bingo sales activities and from seeking to enforce state laws regulating bingo.[5]

The district court found that the Mackey site, where Creek Nation Bingo is located, was part of the lands originally granted by the United States to the Creek Nation by the Treaty of February 14, 1833, and later retained

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tribal courts of the Five Tribes were stripped of their jurisdiction over suits involving their tribal members by the Appropriations Act of June 7, 1897, ch. 3, 30 Stat. 83, which gave the United States court in Indian Territory exclusive jurisdiction over all civil and criminal causes involving all persons and property in Indian Territory "irrespective of race." This provision was justified as necessary to provide the Indians with a substitute for the allegedly corrupt and incompetent tribal court systems in Indian Territory. See, *e.g.*, H.R. Rep. 1102, 54th Cong., 1st Sess. (1896); S. Doc. 182, 54 Cong., 1st Sess. 22-24 (1896); 29 Cong. Rec. 2349-2355 (1897). Finally, Section 28 of the Curtis Act, ch. 517, 30 Stat. 504-505, abolished the tribal courts (except for the Seminole tribal courts), transferring pending actions to the United States court in Indian Territory. At statehood, the Oklahoma Enabling Act of June 16, 1906, ch. 3335, 34 Stat. 267, provided for the transfer of federal cases from the United States court in Indian Territory to the newly created United States District Court for the Eastern District of Oklahoma (§ 16, 34 Stat. 276). All other cases were to be transferred to the courts of the newly created State.

[5] The State of Oklahoma does not prohibit bingo, but licenses and regulates it. Okla. Stat. Ann. tit. 21, §§ 995.1-995.18 (West 1983 & Supp. 1988). Creek Nation Bingo does not comply with state limitations on the fequency of operation, the size of prizes, or the ban on individual profit-making. See Pet. App. A7; Tr. 73 (David Moss testimony). Petitioner does not claim in this Court any authority to prohibit, license or directly regulate Creek Nation Bingo. See *California* v. *Cabazon Band of Mission Indians*, No. 85-1708 (Feb. 25, 1987).

by the Creek Nation under the Treaty of June 14, 1866, and that the tract had never been allotted (Pet. App. A36, A39-A41). The district court also found that title to the Mackey site had been quieted in the Creek Nation by decree of the United States District Court for the Eastern District of Oklahoma in 1925, and that the heirs of Louisa Mackey, whose allotment is adjacent to the tract, have no interest in the Mackey site (*id.* at A40). Because the State of Oklahoma had been an intervenor in the quiet title suit, the district court held the 1925 decree to be res judicata between the Creek Nation and the State on the issue of the Creeks' title to the Mackey site (*id.* at A40, A41 n.9). The district court concluded that the Mackey site is still in Creek tribal ownership and therefore is "Indian country" under 18 U.S.C. 1151(a) (Pet. App. A41).

The district court held that the State's exercise of tax or regulatory jurisdiction over the Creek Nation Bingo activities is preempted in two ways. First, to the extent the sales tax laws impose liability on the Creek Nation as a taxpayer, including liens on the taxpayer's property, those taxes are preempted by federal law (Pet. App. A44-A51). Second, by attempting to tax and regulate activities conducted entirely on tribal land, the State impermissibly interferes with the Tribe's ability to exercise its sovereign functions (*id.* at A44, A52-A54). The district court found that the State's regulation and taxation would "substantially reduce the revenues and economic benefits currently realized by the Creek Nation" and would "impede [the Creek Nation's] ability to carry out its legitimate and paramount concerns of self-sufficiency and economic development" (*id.* at A53).

The district court also held (Pet. App. A54) the Creek Nation Bingo building exempt from state use taxes as a permanent improvement on tax-exempt tribal land.

Mescalero Apache Tribe v. *Jones*, 411 U.S. 145, 158-159 (1973).[6]

4. The court of appeals affirmed the district court's judgment that state regulation and taxation of Creek Nation Bingo are preempted as impermissible interference with tribal sovereignty and federal Indian policies.[7] The court of appeals rejected the State's assertion that the Mackey site is not Indian country because the Creeks had been granted the land in fee simple and had never had a "reservation" as such in Indian Territory (Pet. App. A8-A11). Despite the "unusual nature of Creek Nation title" to the Mackey site, the court of appeals held that Congress clearly expressed its intent that certain land—including the Mackey site—be set apart for the Creeks (*id.* at A9-A11).[8]

The court of appeals reviewed the history of Creek tribal and federal jurisdiction in Indian Territory (Pet. App. A13-A22), and concluded that neither the federal laws enacted prior to Oklahoma's statehood nor the Oklahoma Enabling Act had abolished the Creek Nation's au-

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[6] The district court held that it had jurisdiction over the Creek Nation's suit to enjoin collection of the state taxes under 28 U.S.C. 1362, but that the Tax Injunction Act, 28 U.S.C. 1341, barred the suit of ICUSA, Inc. to enjoin collection of the state taxes; the latter was dismissed as a party (Pet. App. A54-A55).

[7] The court of appeals also affirmed the district court's dismissal of the suit by ICUSA, Inc. against the Oklahoma Tax Commission, but reversed the district court's dismissal of ICUSA, Inc. as a party (Pet. App. A32-A33).

[8] The court of appeals noted that it would be "anomalous" to adopt the State's position that the treaties conferring on the Creek Nation fee simple title—a title "*stronger*" than the mere right of occupancy with title in the United States typical for reservations—would result in a tribal land base with "*less* protection" than a reservation (Pet. App. A12).

thority over its tribal lands or had granted the State the power to tax or regulate tribal activities on tribal land (*id.* at A10-A11, A21-A22).

The court of appeals rejected the State's analogy between its sales taxes on bingo and the sales and excise taxes on cigarettes imported onto the reservation for resale to non-members of the tribe, approved by this Court in *Moe* v. *Confederated Salish & Kootenai Tribes,* 425 U.S. 463 (1976), and *Washington* v. *Confederated Tribes of the Colville Indian Reservation,* 447 U.S. 134 (1980) (Pet. App. A26-A32). In applying the "particularized inquiry into the nature of the state, federal, and tribal interests at stake" required by *White Mountain Apache Tribe* v. *Bracker,* 448 U.S. 136, 145 (1980), the court of appeals found a strong federal interest in promoting and assisting tribal development of bingo operations to reduce tribal dependency on federal assistance (Pet. App. A29-A30). The court of appeals also found a strong tribal interest in the bingo operations as a "product" that was "wholly created, sold, and consumed within the boundaries of Creek Nation lands" (*id.* at A30). Finally, the court of appeals found that the state interest in raising revenue by taxing the bingo operation was weak, particularly since, unlike the cigarette sales cases, bingo customers were traveling onto Creek land not in order to avoid sales taxes but to purchase a product—high stakes bingo—not found elsewhere in the area (*ibid.*).[4] Moreover, the State provided no services to the Mackey site that would justify the tax (*id.* at A32). The court of appeals noted that the imposition of the sales tax would burden the tribal enterprise by increasing the total cost of playing bingo and by

[4] The court of appeals noted that, unlike the cigarette sales cases in which the state lost tax revenue it would otherwise have received, the evidence at trial had shown that the overall effect of Creek Nation bingo on the state and local economy was positive (Pet. App. A30).

imposing collection, remittance, and record-keeping requirements on the Tribe (*id.* at A31). While the court of appeals acknowledged that those burdens might not be great, it concluded that they were sufficient to warrant preemption of the tax because the State's interest in imposing the burdens on the Tribe was minimal (*id.* at A31-A32 & n.9).

The Oklahoma Tax Commission subsequently filed a petition for a writ of certiorari.[10]

DISCUSSION

1. As this Court recently reiterated in *California* v. *Cabazon Band of Mission Indians,* No. 85-1708 (Feb. 25, 1987), slip op. 3 (citations omitted), "[t]he Court has consistently recognized that Indian tribes retain 'attributes of sovereignty over both their members and their territory,' and that 'tribal sovereignty is dependent on, and subordinate to, only the Federal Government, not the States.' It is clear, however, that state laws may be applied to [Indians and their territory] if Congress has expressly so provided." Here, the question is whether, in light of the history of Indian Territory summarized above, there has been the necessary expression of congressional intent to permit the application of the state law at issue to the Mackey site.

Land that is within the definition of "Indian country" in 18 U.S.C. 1151 is subject to tribal and federal, rather than state, jurisdiction.[11] Section 1151 includes, inter alia,

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[10] The other state defendant, David Moses, the District Attorney for Tulsa County, Oklahoma, has not sought a writ of certiorari from the court of appeals' judgment.

[11] Although the definition expressly refers only to criminal jurisdiction (18 U.S.C. 1152), this Court has recognized that it applies as well to civil jurisdiction. *Cabazon,* slip op. 4 n.5; *DeCoteau* v. *District County Court,* 420 U.S. 425, 427 n.2 (1975), and cases there cited.

"all land within the limits of any Indian reservation under the jurisdiction of the United States government," and all Indian allotments (including those outside a reservation) to which Indian title has not been extinguished. The Mackey site is on land granted to the Creek Nation in fee simple by the Treaty of February 14, 1833, and reconfirmed by the Treaty of June 14, 1866. It has never been allotted, and thus has remained in Creek tribal ownership.[12]

The courts below correctly analyzed the complex history of congressional dealings with the Creek Nation and its land and concluded that the Mackey site should be considered Indian country. This highly fact-specific determination, which is fundamental to the resolution of the issues presented by petitioner, does not warrant review by this Court.[13]

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[12] Petitioner challenges the district court's finding (Pet. App. A40-A41), affirmed by the court of appeals (*id.* at A10), that the Mackey site was never allotted and has remained in Creek tribal ownership. Petitioner contends (Pet. 7-8) that the district court erred in relying on a 1925 judgment quieting title to the Mackey site in the Creek Tribe against the heirs of Louisa Mackey, because the judgment was based on a settlement agreement in a dispute over oil and gas royalties rather than on a determination by the earlier district court that the Mackey site had always been in tribal ownership. The district court's reliance in the instant case on the prior quiet title judgment was based on an examination of the extant record in the earlier case. There is no reason for this Court to review the concurrent factual findings of both courts below on this point. See *Tiffany Fine Arts, Inc.* v. *United States,* 469 U.S. 310, 318 n.5 (1985), and cases there cited.

Moreover, the district court found (Pet. App. A40, A41 n.9) that the State of Oklahoma, as a defendant intervenor in the 1925 quiet title suit, was precluded from relitigating the Creek Nation's title to the Mackey site. Thus, the State's contention (Pet. 7) that the Mackey site had been allotted to Louisa Mackey is foreclosed by the prior decree.

[13] The court of appeals' analysis applies only to unallotted Creek tribal land. See note 14, *infra.* We are informed by the Department

Before considering whether the Mackey site is, as petitioner contends (Pet. App. A8-A10), part of a "disestablish[ed] reservation," it is first necessary to determine whether the Creek land in eastern Oklahoma has ever been part of a "reservation" as that term is used in Section 1151. Although the territory granted to the Creek Nation in fee simple by the Treaty of February 14, 1833, and the Treaty of August 7, 1856, was not referred to as a reservation, the court of appeals correctly noted (Pet. App. A8-A9) that no such formal designation is required: "for purposes of defining Indian country, the term [reservation] simply refers to those lands which Congress intended to reserve for a tribe and over which Congress intended primary jurisdiction to rest in the federal and tribal governments" (*id.* at A8). See, *e.g.*, *United States* v. *McGowan*, 302 U.S. 535, 538-539 (1938); *United States* v. *Chavez*, 290 U.S. 357, 364 (1933); *Solem* v. *Bartlett*, 465 U.S. 463, 468-469 (1984). Accordingly, land such as the Mackey site which has remained in tribal ownership since it was granted to the Creek Nation in 1833 is properly considered a "reservation."

Petitioner does not dispute the original existence of a Creek "reservation"; it contends instead (Pet. 8-9) that the Curtis Act and the Creek Agreement disestablished the Creek reservation and terminated the "Indian country" status of any remaining, unallotted tribal land. Applying the principles of this Court's decisions, the court of appeals correctly held that the remaining unallotted Creek tribal land was not divested of Indian country status (Pet.

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of the Interior that there is very little land remaining in Oklahoma that, like the Mackey site, has been in continuous Creek Nation tribal ownership since 1833.

App. A10-A12, A15-A16).[14] While the Curtis Act expressed Congress's intention in 1898 that the Creek Nation (as well as the other Five Tribes) soon would be dissolved and all tribal lands allotted or otherwise removed from tribal ownership, and the Creek Agreement in 1901 expressly provided for the dissolution of the Creek tribal government by March 4, 1906, Congress, in fact, did not dissolve the Creek Tribe and instead provided in the Five Tribes Act for preservation of the tribal governments and the continued existence of all Five Tribes (*Harjo* v. *Kleppe,* 420 F. Supp. at 1129-1143; see also *Creek Nation* v. *United States,* 318 U.S. 629, 638 (1943)). In this setting, the general expectation of Congress at the turn of the century that tribal ownership of land in Indian Territory would be superseded by allotment and that the Five Tribes would be dissolved is a manifestly insufficient basis from which to "extrapolate * * * a specific congressional purpose of diminishing reservations" (*Solem,* 465 U.S. at 468-469). Diminishment or termination of reservation status "will not be lightly inferred" (*id.* at 470). Once a block of land is set aside for an Indian reservation, the "entire block retains its reservation status until Congress explicitly indicates otherwise" (*ibid.*).[15]

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[14] Since unallotted tribal lands "generally remain Indian country despite disestablishment" (Pet. App. A10 n.3 (citations omitted)), the court found it unnecessary to consider the validity of petitioner's disestablishment argument as applied to allotted Creek land, or to other non-tribal lands within the boundaries of the Creek Nation (*id.* at A19 n.5). See pages 14-15, *infra.*

[15] Here, the provisions of the Creek Agreement and the Five Tribes Act show no intention to divest unallotted Creek tribal land of Indian country or reservation status. Unlike the surplus land Act that terminated the Lake Traverse Reservation in *DeCoteau* v. *District County Court, supra,* the Creek Agreement included no provision for cession, sale, relinquishment, or conveyance of unallotted land to the United States. Cf. *DeCoteau,* 420 U.S. at 445-446. In fact, the Creek Agreement made no provision for "surplus lands" as such. The agree-

Indeed, even if Congress had disestablished or terminated the "reservation" status of all Creek Nation lands, the retained Creek tribal land could well remain Indian country for purposes of preemption of state taxing authority. As the court of appeals noted (Pet. App. A10 n.3), the decisions of this Court interpreting surplus land Acts have dealt with whether *non-Indian* unallotted land within the borders of an original Indian reservation remained Indian country. See *Solem* v. *Bartlett, supra; Rosebud Sioux Tribe* v. *Kneip,* 430 U.S. 584 (1977); *DeCoteau* v. *District County Court, supra; Mattz* v. *Arnett,* 412 U.S. 481 (1973); *Seymour* v. *Superintendent,* 368 U.S. 351 (1962). Land such as the Mackey site, which, after completion of the allotment process, still remained in

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ment simply provided that the tribal lands were to be "allotted among the citizens of the tribe * * * so as to give each an equal share of the whole in value" (§ 3, 31 Stat. 862), except for the reservation of land for townsites or specified public buildings or uses (§§ 3, 18, 24, 31 Stat. 862, 867, 868). In contrast, the General Allotment Act, ch. 119, § 5, 24 Stat. 389-390, by which the Lake Traverse Reservation in *DeCoteau* had been allotted, provided that, once a reservation had been allotted, the Secretary of the Interior could negotiate with the tribe for purchase of the remaining, unallotted lands. Even more clearly dispositive of the issue of Congress's intention as to the unallotted Creek land is the Five Tribes Act which, first, continued the tribal existence of the Five Tribes (including the Creek Nation), and second, provided that, upon the dissolution of the Five Tribes (§ 27, 34 Stat. 148),

> the lands belonging to the [Five Tribes] * * * shall not become public lands nor property of the United States, but shall be held in trust by the United States for the use and benefit of the Indians respectively comprising each of said tribes * * *.

Implicit in this provision is Congress's assumption that the Five Tribes had at the time of enactment retained ownership of land, as well as Congress's intention that such unallotted land would remain tribal land until the tribes were dissolved. The Creek Nation was never dissolved and the unallotted Mackey site has remained tribal land.

tribal ownership, may well meet the definition of Indian country in *United States* v. *Pelican,* 232 U.S. 442, 449 (1914): land "validly set apart for the use of the Indians as such, under the superintendence of the Government." See also *United States* v. *John,* 437 U.S. 634, 649 (1978) (applying the above-quoted definition). This conclusion is supported by the fact that allotted land remaining in individual Indian ownership retains Indian country status, even when the reservation of which the allotments were a part has been entirely terminated (18 U.S.C. 1151(c); *DeCoteau,* 420 U.S. at 446-447); it would be anomalous for land remaining in tribal ownership after disestablishment of a reservation not to retain Indian country status as well.[16]

2. The second issue presented by the petition is also highly fact-specific. The court of appeals and the district court recognized that the validity of the state sales tax as applied to tribal activity on the Mackey site must be determined by application of the preemption analysis established by this Court in *White Mountain Apache Tribe* v. *Bracker,* 448 U.S. 136, 145 (1980) and *California* v. *Cabazon Band of Mission Indians,* No. 85-1708 (Feb. 25, 1987), requiring a "particularized inquiry into the nature of the state, federal, and tribal interests at stake" (*Bracker,* 448 U.S. at 145). See also *Ramah Navajo School Bd., Inc.*

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[16] Another potentially complicating factor in determining the boundary line between state, federal, and tribal jurisdiction in eastern Oklahoma is the unique history of the successive limitations on the jurisdiction of the tribal courts of the Five Tribes. See note 4, *supra.* We do not, however, believe that factor is significant in the particular context of this case, which involves only the scope of the state's taxing authority, rather than questions of judicial jurisdiction or even the scope of the state's authority to enforce its criminal laws. Cf. *Cabazon,* slip op. 4-5; *Bryan* v. *Itasca County,* 426 U.S. 373 (1976).

v. *Bureau of Revenue,* 458 U.S. 832, 838-839 (1982) (Pet. App. A28-A29). Under this approach, " '[s]tate jurisdiction is pre-empted * * * if it interferes or is incompatible with federal and tribal interests reflected in federal law, unless the state interests at stake are sufficient to justify the assertion of state authority.' " *Cabazon,* slip op. 13 (quoting *New Mexico* v. *Mescalero Apache Tribe,* 462 U.S. 324, 334 (1983)). The inquiry is to proceed in light of traditional notions of Indian sovereignty and the congressional goal of Indian self-government, which "encompasses far more than encouraging tribal management of disputes between members, but includes Congress' overriding goal of encouraging 'tribal self-sufficiency and economic development.' " *New Mexico* v. *Mescalero Apache Tribe,* 462 U.S. at 335 (quoting *Bracker,* 488 U.S. at 143 (footnote omitted)).

State interference with the federal objective of furthering tribal self-government by the imposition of additional burdens on a tribal enterprise "must ordinarily be justified by functions or services performed by the State in connection with the on-reservation activity" (*New Mexico* v. *Mescalero Apache Tribe,* 462 U.S. at 336). In the area of taxes, a state "must point to more than its general interest in raising revenues" *ibid.*; accord, *Ramah Navajo,* 458 U.S. at 839, 845; *Bracker,* 448 U.S. at 150).[17] The state

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[17] Moreover, as this Court noted in *Cabazon* (slip op. 11-12 n.17 (citation and emphasis omitted)), "the federal tradition of Indian immunity from state taxation is very strong and * * * the state interest in taxation is correspondingly weak. * * * '[I]n the special area of state taxation, absent cession of jurisdiction or other federal statutes permitting it, there has been no satisfactory authority for taxing * * * Indian income from activities carried on within the boundaries of the reservation.' " Petitioner attempts to avoid this "*per se* rule" (*ibid.*) by claiming that the incidence of the tax here is formally on the customers of Creek Nation Bingo, and not directly on the Tribe. The district

interest in imposing a tax is strongest when: (1) the tax is directed at off-resevation value; and (2) the taxpaper is a recipient of state services. *Washington* v. *Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 157 (1980).

Petitioners do not here dispute that *Cabazon* prevents Oklahoma from applying its regulatory standards to Creek Nation Bingo, and nothing in the record of this case establishes any special factor justifying the imposition of state taxes on that operation. Accordingly, it was reasonable for the courts below to conclude that the principles of *Cabazon* prevent the exercise of state taxing authority asserted by petitioners.[18] In any event, we

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court rejected that claim (Pet. App. A44-A51); although the court of appeals agreed that the incidence of the tax was not on the Tribe (*id.* at A26-A28), it nevertheless found the tax preempted after balancing the competing interests of the state and the Tribe (*id.* at A30-A32). Cf. *California State Bd. of Equalization* v. *Chemehuevi Indian Tribe*, 474 U.S. 9 (1985).

[18] The question of state authority to tax customers of Indian bingo operations was not involved in *Cabazon*. The court there did, however, recognize the strong federal and tribal interests in promoting such operations (slip op. 15-17). The record here similarly shows that Creek Nation Bingo is an important source of tribal income and employment (Pet. App. A25, A53; Tr. 83, 90-91). The court below distinguished *Coleville* and the related "smokeshop" cases (*e.g.*, *Moe* v. *Confederated Salish & Kootenai Tribes*, 425 U.S. 463 (1976)), permitting state taxation of Indian sales to non-members of cigarettes imported onto the reservation (Pet. App. A30-A32). In contrast to the "smokeshop" cases, the value generated from Creek Nation Bingo is created on tribal lands by the activities of the Creek Nation. See *New Mexico* v. *Mescalero Apache Tribe*, 462 U.S. at 343. Creek Nation Bingo is not marketing a tax exemption or undermining the state tax base, but is providing a service not available outside of tribal boundaries—high stakes bingo.

submit that, because of its unusual facts, this is not an appropriate case for consideration by this Court of the scope of state taxing authority over on-reservation activities. Creek Nation Bingo is run on a discrete, non-residential tribally owned site, not part of a typical Indian reservation; moreover, petitioner does not contend that the State provides governmental services to the Mackey site itself,[19] but instead asserts that the non-member bingo customers receive no "governmental services" from the tribe.[20] This operation thus does not represent a reasonably typical situation of an Indian-operated enterprise, appropriate for the development of generally useful principles governing the scope of state taxing authority.

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[19] While off-reservation effects of on-reservation activities may warrant assertion of some types of state jurisdiction (*New Mexico* v. *Mescalero Apache Tribe*, 462 U.S. at 343; *Colville*, 447 U.S. at 163-164), the State in this case has not sought to justify its taxation of Creek Nation Bingo by pointing to any additional burdens or costs incurred as a result of the bingo operation. Rather, petitioner seeks to justify taxation of Creek Nation Bingo sales based entirely on the governmental services ordinarily provided the bingo customers when they are outside the tribal boundaries.

[20] The testimony did show that the Creek Nation, through its agent ICUSA, Inc., supplies a security force to protect the customers while they are on tribal land, provides a first aid station for the customers' emergency medical needs, and furnishes all water and sewer services for the bingo hall from wells and a septic system located on the tribal land (Tr. 433-435).

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

CHARLES FRIED
Solicitor General
ROGER J. MARZULLA
Assistant Attorney General
LAWRENCE G. WALLACE
Deputy Solicitor General
HARRIET S. SHAPIRO
Assistant to the Solicitor General
EDWARD J. SHAWAKER
LAURA E. FROSSARD
Attorneys

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